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Supreme Court, U.S.
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No.

In The
Supreme Court of the United States
October 2002 Term

JUDICIAL WATCH, INC.

Petitioner,

v.

CHARLES O. ROSSOTTI, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a writ of certiorari should issue because the Appellate Court's ruling conflicts with relevant decisions of this Court on an important question of federal law, namely, whether a *Bivens* action is available to remedy a politically-inspired, retaliatory tax audit?

2. Whether a writ of certiorari should issue to resolve this important question of federal law that has not been, but should be, settled by this Court?

3. Whether a writ of certiorari should issue to resolve a conflict among the United States courts of appeals about this important question of federal law?

LIST OF PARTIES

The following is a list of parties and each corporate party's respective parent corporation and subsidiaries, if any.

Petitioner:

1. Judicial Watch, Inc.

Respondents:

1. Charles O. Rossotti
2. Donna Dorsey
3. Peter Breslan
4. Wayne Hampel
5. Steven T. Miller
6. United States of America

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OPINIONS BELOW

The decision of the U.S. District Court for the District of Maryland (hereinafter "District Court") is reported at 217 F. Supp. 2d 618. *See* Appendix C at App. 31-50. The decision of the U.S. Court of Appeals for the Fourth Circuit (hereinafter "Appellate Court") is reported at 317 F.3d 401. *See* Appendix A at App. 1-28. The Appellate Court's denial of Petitioner's petition for rehearing en banc is unreported. *See* Appendix B at App. 29-30.

STATEMENT OF JURISDICTION

The District Court dismissed Petitioner's claims against Respondents, brought under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 396-97 (1971), on March 27, 2002. Petitioner appealed to the Appellate Court, which affirmed the District Court's dismissal on January 24, 2003. The Appellate Court denied Petitioner's timely petition for rehearing *en banc* on March 24, 2003.

This petition for writ of certiorari is timely, as it is being filed within ninety (90) days of the March 24, 2003 denial of the petition for rehearing *en banc*, or by June 23, 2003.

If this petition for writ of certiorari is granted, the U.S. Supreme Court will have jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. Procedural History

Judicial Watch, Inc. initiated this action on September 6, 2001. Count I alleges that Judicial Watch, Inc. was subjected to a retaliatory, politically-motivated tax audit in violation of Judicial Watch, Inc.'s First Amendment rights. Count II alleges a violation of Judicial Watch, Inc.'s Fifth Amendment rights by reason of the audit, and Count III alleges a claim for selective prosecution. Count IV and V concern requests by Judicial Watch, Inc. under the Freedom of Information Act ("FOIA") for documents about the audit.

On March 27, 2002, the District Court dismissed Counts I, II and III. In so ruling, the District Court found that, while a *Bivens* remedy was available to Judicial Watch, Inc., the federal officials alleged to have violated Judicial Watch, Inc.'s constitutional rights were entitled to immunity for their actions. After the parties consented to entry of a final

judgment on Counts I, II and III, Judicial Watch, Inc. appealed. On January 24, 2003, the Appellate Court affirmed the dismissal of Judicial Watch, Inc.'s claims, albeit for a different reason. Contrary to the District Court and at least one other court of appeals, the Appellate Court found that a *Bivens* action was not available to remedy the alleged violation of Judicial Watch, Inc.'s constitutional rights.

Judicial Watch, Inc. filed a timely petition for rehearing *en banc* on March 10, 2003. However, the petition was denied on March 23, 2003.

B. Statement of Facts

Judicial Watch, Inc. is a non-partisan, non-profit, tax-exempt Section 501(c)(3) educational foundation organized in 1994 to restore ethics, morality and respect for law to our nation's public life. (JA 205, 207, 419).[1] Judicial Watch, Inc. relies FOIA, the civil discovery process and the litigation, among other tools, to educate the American people about corruption in government and abuses of power, and to hold the responsible parties accountable. (JA 205). Judicial Watch, Inc. also utilizes the civil litigation process as a means of exercising its First Amendment rights.

In accordance with its mission, Judicial Watch, Inc. has pursued corruption and abuses of power by Democrats, Republicans, and other political and governmental parties and interests. (JA207-08, 419). Judicial Watch, Inc. has also pursued matters that do not relate to government, but

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[1] "JA" refers to the Joint Appendix submitted to the Appellate Court by the parties.

nonetheless implicate other important public interest concerns over ethics and the rule of law. (JA208).

As part of its public interest activities, in 1998, Judicial Watch, Inc. uncovered a pattern of abuses of power by officials of the Internal Revenue Service ("IRS") to retaliate against perceived adversaries and critics of the IRS and of the Clinton Administration, including several of Judicial Watch, Inc.'s clients, donors and others sympathetic to its mission. [2] (JA208). Judicial Watch, Inc. documented theses abuses in its "Interim Report: Crimes and Other Offenses Committed by

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[2] The list of conservative organizations that had been critical of the Clinton Administration and were subjected to tax audits is staggering. It includes, but is not limited to the following: The National Rifle Association; The Heritage Foundation; *The National Review*; *The American Spectator*; Freedom Alliance; the Western Journalism Center; National Center of Public Policy Research; American Policy Center; American Cause; Citizens Against Government Waste; Citizens for Honest Government; Progress and Freedom Foundation; Concerned Women for America; and the San Diego Chapter of Christian Coalition. The following conservative organizations had been critical of the Clinton Administration and received warnings or other indications that they would be audited: Free Congress Foundation; Fortress America; Christian Film and Television Commission; and Center for Bioethical Reform. The following clients of Judicial Watch, Inc. were audited during the Clinton Administration: Juanita Broaddrick; the Western Journalism Center; Gennifer Flowers; Paula Jones, former White House Travel Office Director Billy Dale and Clinton protestor Katherine Prudehomme.

President Bill Clinton Warranting His Impeachment and Removal from Elected Office" ("Interim Report"). (JA208). The Interim Report was submitted to members of the U.S. House of Representatives Committee on the Judiciary on September 28, 1998 and was accepted into the Congressional Record and made an official part of Congress' impeachment proceedings on October 5, 1998. (JA208).

On or about October 9, 1998, only four days after its Interim Report was made an official part of Congress' impeachment proceedings, Judicial Watch, Inc. received a letter (the "Audit Letter"), signed by Donna Dorsey, stating that Judicial Watch had been selected for an audit. (JA209, 232-34). Accompanying the Audit Letter was an IRS Form 4564 Information Document Request, which made the extraordinary demand that Judicial Watch, Inc. "[p]rovide the . . . relationship to any political party or political groups" of its directors. (JA209, 232-34). Ironically, just a few weeks after receiving the Audit Letter, Judicial Watch, Inc. received notice from the IRS confirming its tax-exempt status. (JA209, 236). It is extraordinarily unusual for an organization to be selected for an audit at the same time as its tax exempt status is being confirmed by the IRS. (JA209). The audit Letter was likely sent at the express or implied request of the Executive Office of the President in retaliation for Judicial Watch, Inc.'s public interest legal advocacy accusing the President, Mrs. Clinton and the Clinton Administration of multiple acts of misconduct, culminating in its impeachment report. (JA209).

At the time Judicial Watch, Inc. received the Audit Letter, the Commissioner of the IRS was Charles O. Rossotti, a Clinton appointee. (JA209). Before becoming Commissioner,

Rossotti had been head of American Management Systems, Inc. ("AMS"), one of the largest information and technology consulting firms in the United States and a major, multi-million dollar contractor for the IRS. (JA209-10). Rossotti and his family also reportedly held between $8 and $40 million in shares of AMS. (JA210). Rossotti's AMS holdings posed a significant conflict of interest. (JA210). The Clinton Administration did not require Rossotti to sell his AMS holdings when he became Commissioner of the IRS, and, on or about December 11, 2000, the Clinton Administration granted a formal "waiver" of Rossotti's conflict of interest. (JA210). Rossotti thus was beholden to the Clinton Administration, not only for his appointment, but also for the financial benefits that he and his family would and did receive as shareholders of AMS. (JA210).

On or about November 23, 1998, Dorsey, who had sent the original Audit Letter to Judicial Watch, Inc., admitted in a discussion with representatives of Judicial Watch, Inc. that the audit was a "hot potato" and that she had received telephone calls from "higher-ups" in the IRS about it. (JA211). Later, on January 12, 1999, representatives of Judicial Watch, Inc. met with Dorsey, Peter Breslan and Wayne Hampel, among other representatives of the IRS's Baltimore District Office responsible for overseeing tax exempt organizations. (JA211). During the course of this meeting, Breslan stated, in the context of discussing the propriety of the audit, "What do you expect when you sue the President?," effectively acknowledging a retaliatory, political motive for the audit. (JA211). Breslan repeated this sentiment several times in the presence of several people, saying that if Judicial Watch, Inc. scrutinizes the government and asks questions, the government will scrutinize and ask

questions of Judicial Watch, Inc. (JA211). No one from the IRS objected to or dissented from any of the statements made by Breslan. (JA211).

On or about May 4, 1999, at a meeting between Judicial Watch, Inc. and various IRS officials, including Dorsey, Breslan, and Hampel, the IRS's Baltimore District Director Paul Harrington made the statement that the political affiliation of Judicial Watch, Inc.'s board members was part of the raw data that would be used in evaluating Judicial Watch, Inc.'s operations and rendering a decision in the audit process. (JA211). Dorsey, Breslan and Hampel did not object or dissent from that statement and implicitly acquiesced in it. (JA211).

On May 14, 1999, one of Judicial Watch, Inc.'s counsel was told that Judicial Watch, Inc.'s "concerns" about the proposed audit being retaliatory and politically-inspired had been forwarded to the Treasury Inspector General for Tax Administration ("TIGTA"). (JA212). On June 17, 1999, Judicial Watch, Inc. met with Acting Director Steven T. Miller and other officials at the IRS's national headquarters in Washington, D.C. (JA212). At this meeting, Judicial Watch, Inc. set forth its substantial concerns about the illegitimate, political motivation for the proposed audit, and the IRS's failure to respond to a FOIA request by Judicial Watch, Inc. seeking information from the IRS related to Judicial Watch, Inc. and its founder and Chairman, Larry Klayman. (JA212). Miller conceded that the IRS's conduct had created at least the appearance of a "problem," but claimed he was powerless to stop the audit. (JA212). Nonetheless, on July 13, 1999, Hampel, manager of the IRS's Exempt Organizations Branch Office of the Baltimore

District, informed Judicial Watch, Inc.'s counsel that the IRS was withdrawing the proposed audit at least until the FOIA requests made by Judicial Watch, Inc. were responded to and the TIGTA investigation was concluded. (JA213).

In mid-February 2000, Sheryl Hall, then a White House employee, revealed in a court proceeding filed by Judicial Watch, Inc. that The White House knowingly failed to produce incriminating e-mail evidence in response to legitimate document requests and subpoenas from the Court, Congress and the Office of the Independent Counsel ("OIC"), and that independent contractors responsible for overseeing The White House e-mail system had been threatened with jail if they revealed The White House's failure to produce this evidence. (JA213). Ms. Hall's statements led to a barrage of very negative press and legal ramifications for President and Mrs. Clinton and The White House. (JA213). Immediately following this development, Hampel of the Baltimore District Office contacted one of Judicial Watch, Inc.'s counsel and "reminded" him that Judicial Watch, Inc. was still on the IRS's "radar screen" for an audit. (JA 213). Hampel did not state at this or any other time that TIGTA had completed its investigation. (JA213).

On or about March 29, 2000, Judicial Watch, Inc. obtained an unprecedented court ruling that President Clinton had "the requisite intent for committing a criminal violation of the Privacy Act" when he released White House records protected by the Privacy Act in order to try to discredit Kathleen Willey, a woman who had accused him of sexually harassing her. (JA213-14). *See Alexander v. FBI,* 193 F.R.D. 1, 8-9 (D.C. Cir. 2000). The ruling in *Alexander* resulted in

further negative media coverage and legal ramifications for the President and The White House. (JA214).

One week later, on April 5, 2000, Hampel again contacted one of Judicial Watch, Inc.'s counsel to "remind" him that Judicial Watch, Inc. was on the IRS "radar screen." (JA214). On April 14, 2000, Judicial Watch, Inc. alerted Miller, by letter, that it viewed Hampel's "reminder" as a renewed threat to Judicial Watch, Inc. and a warning to "back off" of its public interest legal advocacy. (JA214). On April 19, 2000, Judicial Watch, Inc. received a renewed notice of the planned audit. (JA214, 266-75). It contained a voluminous document request seeking virtually every document ever created by Judicial Watch, Inc. (JA214).

On June 1, 2000, Judicial Watch, Inc. sent a letter to Miller pointing out the recent IRS misconduct with respect to Judicial Watch, Inc., its clients, and other conservative organizations. (JA214, 277-88). In its letter, Judicial Watch, Inc. requested that the IRS withdraw its renewed audit plans and not consider initiating another audit until after a new president took office on January 20, 2001. (JA215-15, 277-88). The letter, again, put the IRS on notice that Judicial Watch, Inc. viewed the IRS's audit and other misconduct as "political retaliation by the IRS on behalf of its administration." (JA281). Miller agreed to delay consideration of the audit at least until after January 20, 2001, in exchange for Judicial Watch, Inc.'s waiver of any statute of limitations defense it might otherwise be entitled to assert. (JA215). *See* 26 U.S.C. § 6501(a) (2002).

On January 8, 2001, in contravention of the promise made by Miller and with less than two weeks of the Clinton

Administration remaining, Judicial Watch, Inc. received yet another notice of the proposed audit from the IRS ("Third Notice"). (JA215, 290-99). Included with the Third Notice was the same highly unusual, highly burdensome list of thirty-eight requests for documents that was submitted with the audit notice dated April 19, 2000. (JA215, 290-99).

On June 6, 2001, Judicial Watch, Inc. filed additional FOIA requests, this time seeking various documents concerning the conflict of interest waiver granted to Rossotti by the Clinton administration (the "Rossotti FOIA Requests"). (JA216). The Rossotti FOIA Requests coincided with an investigation commenced by Judicial Watch, Inc., in the public interest, to explore the circumstances surrounding the granting to Rossotti of the conflict of interest waiver. (JA216). On or about July 24, 2001, only a few weeks after responses were due to these FOIA requests, one of Judicial Watch, Inc.'s counsel received a telephone call from a representative of the IRS, Daniel Rose, who indicated that the IRS intended to pursue the audit of Judicial Watch, Inc. vigorously and that he and two other agents had been assigned to examine Judicial Watch, Inc.'s records and business. (JA216).

In late July 2001, Judicial Watch, Inc. filed a public interest lawsuit against Rossotti and the Department of the Treasury in which it sought to compel the disclosure, under FOIA, of documents relating to the conflict of interest waiver Rossotti obtained with respect to his affiliation with and shareholdings in AMS. (JA217). On August 16, 2001, approximately three weeks after Judicial Watch, Inc. filed suit relating to Rossotti's conflict of interest, the IRS served Judicial Watch, Inc. with a new demand, this time seeking

twenty-three different categories of documents, and yet another threat that "[f]ailure to comply with our request for information could result in the loss of your tax-exempt status." (JA217).

Each time the IRS contacted Judicial Watch, Inc. about the audit, the contact occurred shortly after Judicial Watch, Inc. uncovered damaging information, made a disclosure, obtained a favorable court ruling, or undertook some legal action in furtherance of its public interest activities concerning high-ranking government officials. (JA217). This unmistakable pattern of retaliatory conduct on behalf of the IRS further confirms that the audit is in direct retaliation for Judicial Watch, Inc.'s public interest activities, which monitor the legality and ethics of actions by public officials. (JA217).

As a result of the IRS's consistent and prolonged harassment, Judicial Watch, Inc. was compelled to file the underlying legal action on September 6, 2001. (JA218). Judicial Watch, Inc. specifically alleged that it was bringing the lawsuit "for deprivation of constitutional rights guaranteed by the First and Fifth Amendments to the United States Constitution." (JA9, 204-05). Indeed, Judicial Watch, Inc. averred, *inter alia,* that

> [in] pursuing [the] unlawful, retaliatory, politically-inspired tax Audit, . . . Rossotti, Dorsey, Breslan, Hampel, and Acting Director Miller violated Judicial Watch's, Inc.'s First Amendment rights . . . [and] . . . knew the proposed Audit . . . was unlawful, but acted willingly, and knowingly, and with specific intent to deprive Judicial Watch, Inc. of its constitutional

> rights, or with deliberate indifference to Judicial Watch, Inc.'s constitutional rights.

(JA21, 221). Judicial Watch, Inc. also alleged that "[e]ach audit notice served on Judicial Watch, Inc. constitutes a violation of the due process rights afforded by the Fifth Amendment of the United States Constitution," and that Rossotti, Dorsey, Breslan, Hampel and Miller, "in violation of Judicial Watch, Inc.'s First Amendment and Fifth Amendment rights, commenced, or refused to exercise their authority to halt, the unlawful, retaliatory, politically-inspired tax Audit of Judicial Watch, Inc. to punish it for its public interest legal advocacy." (JA23-24, 222-24).

However, filing suit only hardened the IRS officials' resolve to harm Judicial Watch, Inc. (JA218). Until then, the various IRS audit notices had been directed only to tax years 1996 and 1997. (JA232-34, 266-75, 290-99, 317-20). In yet another blatant act of retaliation, on December 10, 2001, the IRS sent Judicial Watch, Inc. a new audit notice informing Judicial Watch, Inc. that it was expanding the scope of the audit to include 1998, 1999 and 2000 and including an expansive request for information and documents (the "Dec. 10 Request"). (JA218-19, 323-26). The Dec. 10 Request sought the production of twenty-five categories of documents, much of it including the years 1994 and 1995, and thus encompassing the entire seven-year period that Judicial Watch, Inc. had been in existence. (JA218-19, 323-26). The Dec. 10 Request was clearly onerous, tremendously over-broad and unduly burdensome. For example, it sought "all JW outgoing and incoming correspondence files for calendar years 1994, 1995, 1996, 1997, 1998, 1999 and 2000" without regard to subject matter (JA218-19, 323-26), and

"documentation listing each donor, the date, and the amount, who donated to JW, directly or indirectly, money, securities, or other property worth $3,000 or more during any single tax period ending during 1994, 1995, 1996, 1997, 1998, 1999 or 2000." (JA218-19, 323-26). The Dec. 10 Request demanded the production of the documents by January 10, 2002, only thirty days from the date of the request. (JA218, 323).

On December 18, 2001, Judicial Watch, Inc. sent the IRS additional requests for documents pursuant to FOIA, reiterating earlier FOIA requests to which the IRS had not fully responded. (JA219). The IRS still has not provided responses to these December 18, 2001 FOIA requests. (JA219).

On January 18, 2002, despite this pending litigation challenging the constitutionality of the IRS's audit and seeking injunctive relief, the IRS served an administrative summons on Judicial Watch, Inc. in further pursuit of its retaliatory and politically-motivated audit. (JA453-58). The administrative summons demanded the production of virtually every document ever created by Judicial Watch, Inc., including the names of all of Judicial Watch, Inc.'s donors for the seven-year period from 1994 to the present, and demanded that the documents, which would comprise nearly all of Judicial Watch, Inc.'s office files, be delivered to the IRS's offices just eight business days from the date the summons was served. (JA436-47, 453-58). The burdensomeness and breadth of the summons -- calling for the production of seven years of records in just eight days -- was unprecedented and remarkable. (JA437). The summons was signed and issued by Hampel, "Group Manager" of the IRS, who previously had implicitly threatened an audit to try to scare Judicial Watch,

Inc. away from pursuing its public interest advocacy. (JA437).

Anticipating that the IRS would attempt to enforce its overreaching and retaliatory summons through a summons enforcement action in federal court, on January 30, 2002, Judicial Watch, Inc. filed a motion to stay in the District Court. (JA404-82). In its motion, Judicial Watch, Inc. asked the District Court to stay or enjoin any attempt to enforce the summons, or issue any other IRS summons to Judicial Watch, Inc. until such time as Judicial Watch, Inc. had obtained a final determination on the merits of its constitutional and FOIA claims in the underlying lawsuit. (JA404-82). The District Court denied that motion on March 27, 2002, on the basis that it lacked subject matter jurisdiction to issue the stay and injunctive relief Judicial Watch, Inc. requested. (JA665-86).

On March 28, 2002, just one day after the District Court denied Judicial Watch, Inc.'s motion, the United States of America filed a petition to enforce the administrative summons in the United States District Court for the District of Columbia, Case No. 02-ms-144(ESH). On December 11, 2002, the District of Columbia court ordered, after a summary proceeding, that the summons be enforced without substantial alteration. That ruling is now on appeal to the U.S. Court of Appeals for the District of Columbia Circuit.

REASONS FOR GRANTING THE WRIT

I. A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE THE APPELLATE COURT'S RULING CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT ON AN IMPORTANT QUESTION OF FEDERAL LAW, NAMELY, WHETHER A *BIVENS* ACTION IS AVAILABLE TO REMEDY A POLITICALLY-INSPIRED, RETALIATORY TAX AUDIT

Imagine a democratic society in which the government's power to conduct tax audits is used to retaliate against and penalize its critics. The abuse of the government's substantial power in this manner has, unfortunately, been all too common. *See, e.g.*, Ronald Steel, "Schultz's Way," *The New York Times*, January 11, 1987 (quoting President Nixon saying, in reference to then Treasury Secretary George P. Schultz's refusal to authorize tax audits of Nixon's critics, "What does that candy ass think I sent him over there for?").

Politically-inspired tax audits used to punish or retaliate against citizens for exercising their First Amendment right to criticize the government are unquestionably unconstitutional and illegal. *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998) ("[t]he general rule has long been clearly established" that "the First Amendment bars retaliation for protected speech . . . ."). However, waiting until a tax liability is assessed as a result of the unconstitutional audit (if in fact a tax liability ever is assessed), then allowing the taxpayer to sue for a refund and/or any damages that arise from the collection of the assessed taxes, does nothing to remedy cases where a punitive, retaliatory tax audit is undertaken in violation of the

First Amendment, causing tremendous financial damage and personal suffering, but no tax liability is assessed.[3] Unless a *Bivens* remedy is allowed, the victims of these unconstitutional tax audits are left without any damages remedy simply because, at the end of the day, no tax liability is found.[4] That is precisely the situation in which Judicial Watch, Inc. finds itself.

Nonetheless, the Appellate Court refused to allow Judicial Watch, Inc. a *Bivens* remedy, citing this Court's rulings in *Bush v. Lucas*, 462 U.S. 367 (1983) and *Schweiker v. Chilicky*, 487 U.S. 412 (1988). The Appellate Court specifically found that remedies allowed under the Internal Revenue Code, in the unlikely event that a tax liability is assessed as a result of a punitive, retaliatory tax audit, preclude any *Bivens* remedy:

> We conclude, therefore, that in this case "it would be inappropriate to supplement [the] regulatory scheme with a new judicial remedy" for alleged retaliatory tax

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[3] In the District Court, Respondents conceded that the only statutory remedies available to Judicial Watch, Inc. through the Internal Revenue Code consisted of a suit for a refund, if taxes are ultimately assessed, and a suit for declaratory relief, if Judicial Watch, Inc. is stripped of its tax-exempt status. App. 43, n.12.

[4] It is logical to conclude that no tax liability would result in the majority of cases of punitive, retaliatory, unconstitutional tax audits, because such audits are, by definition, commenced in bad faith and without a proper basis in fact or law.

> audits. *Bush*, 462 U.S. at 368. As in *Chilicky*, although "the creation of a *Bivens* remedy would obviously offer the prospect of relief for injuries that must now go unredressed," the fact that Congress "has not failed to provide meaningful safeguards or remedies for the rights of persons" similarly situated counsels against any judicial extension of *Bivens* liability. *Chilicky*, 487 U.S. at 425.

App. 27.

Judicial Watch, Inc. respectfully submits that the Appellate Court's ruling conflicts with this Court's rulings in *Bush* and *Chilicky* because the Appellate Court's ruling read those cases too broadly. In *Chilicky*, which concerned the denial of Social Security Disability Insurance benefits, after surveying the extensive remedial provisions of the Social Security Act, this Court determined that "Congress . . . has not failed to provide meaningful safeguards or remedies for the rights or persons situated as [the plaintiffs] were." *Chilicky*, 487 U.S. at 425. While this Court agreed that the restoration of back benefits afforded by the statute would not provide a complete remedy to the plaintiffs, it held that the relief provided by the statute afforded a sufficient remedy, and, therefore, declined to authorize a supplemental form of relief. *Chilicky*, 487 U.S. at 428-29.

This Court reached a similar conclusion in *Bush*. In that case, the plaintiff, a federal employee, alleged that he was demoted for exercising his First Amendment rights by making statements to the press that were critical of the government. *Bush*, 462 U.S. at 369-70. He exercised his statutory right to challenge the demotion before the Civil Service Commission,

was reinstated to his previous position, and received an award of back pay. *Bush*, 462 U.S. at 370-71. He also sought damages in state court for violation of his First Amendment rights. *Bush*, 462 U.S. at 371. On appeal from this state court action, this Court explained:

> the question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that had been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue.

Bush, 462 U.S. at 388. Answering this question in the negative, the Court declined to augment the remedy available to the plaintiff. *Bush*, 462 U.S. at 390.

In this case, Judicial Watch, Inc. argued that, unlike in *Chilicky* and *Bush*, no meaningful relief at all was available to remedy the violation of its core First Amendment rights to criticize the government, and therefore the serious constitutional wrong alleged by Judicial Watch, Inc. would go unredressed in the absence of a *Bivens* remedy. By contrast, in *Schweiker*, the plaintiffs could still recover the denied social security benefits. *Schweiker*, 487 U.S. at 428. In *Bush*, the plaintiff could still be reinstated and receive an award of back pay. *Bush*, 462 U.S. at 370-71. *Schweiker* and *Bush* hold that, when Congress affords a remedy for a particular harm, a court may not judicially create an additional remedy, even if the congressionally-created remedy does not afford complete relief. Those cases do **not**, however, stand for the proposition that, when Congress has created no remedy at all for a constitutional violation, a *Bivens* remedy may not be

afforded to those whose constitutional rights have been violated simply because Congress affords other remedies for unrelated violations that occur in the course of administering the government program or activity at issue.

Indeed, this was exactly the conclusion reached in a concurring opinion by Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit") in *Western Center for Journalism v. Cederquist*, 235 F.3d 1153, 1158-59 (9th Cir. 2000), a substantially similar case concerning a punitive, retaliatory tax audit that concluded with a finding of no tax liability, and, hence, none of the statutory remedies allowed by the Internal Revenue Code were available to the plaintiff. Judge Reinhardt determined:

> . . . unlike [cases] in which the Internal Revenue Code (Code) provides a mechanism for the taxpayer to be compensated for the wrongful collection of taxes and the wrongful determination of the amount of taxes owed, in this case, the Code does not authorize any relief (other than a declaratory judgment, see 26 U.S.C. § 7428(a)); nor does that Code preclude relief for the type of injury alleged here -- harassment by means of a retaliatory audit on account of the expression of one's political views.
>
> If the IRS actually conducts audits of organizations to retaliate against them for exercising their First Amendment right to criticize government officials, courts certainly have the authority to intervene. The *Bivens* remedy is a powerful tool against such governmental abuse, and must be available in appropriate cases.

Cederquist, 235 F.3d at 1159.

Judge Reinhardt reached this compelling conclusion by citing to an equally compelling decision by the U.S. Court of Appeals for the Tenth Circuit ("Tenth Circuit") in *National Commodity & Barter Ass'n v. Archer*, 31 F.3d 1521 (10th Cir. 1985), in which that Court also determined that a *Bivens* remedy was available to a taxpayer subject to a punitive, retaliatory, unconstitutional tax audit for which the Internal Revenue Code provided no remedy:

> The Tenth Circuit has explained that, in cases in which the Code does not provide any mechanism for compensation, IRS officers are not shielded from liability simply because the Code contains remedies for other, unrelated violations. *National Commodity & Barter Ass'n*, 31 F.3d at 1530 (*Bivens* remedy against IRS officials proper to redress injury to First Amendment rights caused by seizure of organization's membership lists); *cf. id.* at 1532 (no *Bivens* remedy to redress harm caused by jeopardy assessment, because the Code provides a mechanism to remedy wrongful collection of taxes). I agree with the Tenth Circuit that a *Bivens* remedy is available in First Amendment cases involving the type of IRS harassment alleged here.

Cederquist, 235 F.3d at 1159.

In both *National Commodity & Barter Ass'n v. Gibbs*, 886 F.2d 1240 (10th Cir. 1989) (*NCBA I*) and *National Commodity & Barter Ass'n v. Archer*, 31 F.3d 1521 (10th Cir. 1994) (*NCBA II*), the Tenth Circuit allowed a *Bivens* claim to

proceed against IRS officials based upon allegations that the officials harassed and retaliated against the plaintiffs for advocating the abolition of the IRS, but would not allow a *Bivens* claim to proceed based upon allegations of unlawful tax collection practices. Specifically, the plaintiffs in *NCBA I* and *NCBA II* alleged that IRS officials engaged in a pattern of improper conduct to "demoralize, paralyze, and ultimately destroy a non-commercial, voluntary, political/educational association of individuals advocating dissident view as to the tax, monetary and fiscal laws and policies of the government" in violation of their First and Fourth Amendment rights. *NCBA I*, 886 F.2d at 1244. The plaintiffs also alleged that they were improperly subjected to tax penalties known as jeopardy assessments in violation of their Fifth Amendment rights.[5] *NCBA I*, 886 F.2d at 1248. The Tenth Circuit expressly declared that the plaintiffs could bring a *Bivens* action to remedy violations of their First and Fourth Amendment rights:

> In *Pleasant v. Lowell*, without directly considering the issue, this court permitted individuals to proceed in first and fourth amendment *Bivens* claims against agents of the Internal Revenue Service for certain activities also described in the complaint at issue in this case. Implicit in our holding in *Pleasant* is the recognition that, while the comprehensive scheme of

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[5] Jeopardy assessments allow the IRS to seize assets where it believes its future ability to collect a tax deficiency will be harmed by any delay. Jeopardy assessments are specifically authorized by statute, and Congress has enacted well-defined procedures for challenging them. 26 U.S.C. §§ 6861, 6862 and 6863.

> the Internal Revenue Service should not be indiscriminately disrupted by the creation of new remedies, certain values, such as those protected by the first and fourth amendments, may be superior to the need to protect the integrity of the internal revenue system. We therefore recognized that the NCBA may bring a *Bivens* action for violations of the first and fourth amendments.

NCBA I, 886 F.2d at 1248 (citations omitted); *NCBA II*, 31 F.3d at 1527-32.

At the same time, the Tenth Circuit in *NCBA I* and *NCBA II* would not allow the plaintiffs to maintain claims against IRS officials under *Bivens* for the allegedly unlawful jeopardy assessments:

> In further support of their constitutional claims, plaintiffs allege that wrongful jeopardy assessments were made against NCBA. . . . In *NCBA I*, we held that the NCBA did not state a *Bivens* claim under the Fifth Amendment or the Internal Revenue Code for the wrongful assessments. We reasoned that "the NCBA has all sorts of rights against overzealous officialdom, including, most fundamentally, the right to sue the government for a refund if forced to overpay taxes, and it would make the collection of taxes chaotic if a taxpayer could bypass the remedies provided by Congress simply by bringing a damage action against [government employees.]"
>
> This reasoning is equally applicable to the claim grounded on the allegations of wrongful jeopardy

> assessments here under the First and Fourth Amendments. In light of the remedies afforded elsewhere, we decline to recognize a First or Fourth Amendment *Bivens* remedy based on the allegations of wrongful jeopardy assessments made by the instant complaint.

NCBA II, 31 F.3d at 1532 (emphasis added) (citations omitted).

These holdings are entirely consistent with any fair reading of *Chilicky* and *Bush*. Where Congress has created an alternative remedy, such as for unlawful tax collection practices, those remedies render *Bivens* claims unnecessary. Where there is no such alternative remedy, such as in *Cederquist*, *NCBA I*, *NCBA II*, and in this case, a *Bivens* action is the only remedy available to vindicate the important constitutional rights secured by the First Amendment.

In fact, the District Court also drew this same distinction and found a *Bivens* remedy exists where IRS officials retaliate against citizens for expressing their First Amendment right to criticize the government, citing *Cederquist, NCBA I* and *NCBA II*, among other authority:

> . . . the United States Supreme Court has restricted the availability of *Bivens* actions, by expanding on the language in *Bivens* indicating that such relief is permissible only when there are "no special factors counseling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396. The Court has found that affirmative action by Congress to create a statutory or regulatory remedial scheme, even if the

scheme lacks complete remedies for constitutional violations, is sufficient to bar a *Bivens* action. *See, e.g., Schweiker v. Chilicky*, 487 U.S. 412, 101 L. Ed. 2d 370, 108 S. Ct. 2460 (1988) (remedial scheme in context of social security system); *Chappell v. Wallace*, 462 U.S. 296, 304, 76 L. Ed. 2d 586, 103 S. Ct. 2362 (1983) (remedial scheme in context of military justice system); *Bush v. Lucas*, 462 U.S. 367, 368, 76 L. Ed. 2d 648, 103 S. Ct. 2404 (1983) (remedial scheme in context of civil service system). Summing up its approach to these cases, the Court stated, "when the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies." *Schweiker* at 423.

Circuit courts have applied this reasoning to deny *Bivens* claims in lawsuits against I.R.S. employees where the plaintiffs would have another avenue of relief through the provisions of the Internal Revenue Code. *See, e.g., Shreiber v. Mastrogiovanni*, 214 F.3d 148 (3rd Cir. 2000); *Fishburn v. Brown*, 125 F.3d 979, 982-83 (6th Cir. 1997); *Vennes v. Unknown Number of Unidentified Agents*, 26 F.3d 1448, 1453-53 (8th Cir. 1994). **In these cases, however, the harm caused by the alleged constitutional violations amounted to the illegal assessment or collection of taxes, which could be cured, at least for the most part, by refund suits and other similar statutory remedies. In contrast, where the constitutional violation is a harm in itself, such as**

> **the suppression of political speech or the violation of Fourth Amendment rights, courts have recognized the propriety of a *Bivens* remedy**. *See, Nat'l Commodity and Barter Assoc. v. Gibbs*, 886 F.2d 1240, 1248 (10th Cir. 1989) (permitting Bivens action for violations of the First and Fourth Amendments because "certain values . . . may be superior to the need to protect the integrity of the internal revenue system"); *Western Center for Journalism v. Cederquist*, 235 F.3d 1153, (9th Cir. 2000) (Reinhardt, J., concurring) (observing that a *Bivens* remedy is appropriate for retaliatory audits because Congress has fashioned no remedy for I.R.S. conduct that punishes political speech); *Hurt v. United States*, 889 F. Supp. 248 (S.D. W. Va. 1995) (finding grounds for a *Bivens* remedy where plaintiffs sued I.R.S. agents for allegedly retaliatory and harassing auditing practices).
>
> Accordingly, this Court is persuaded that a *Bivens* action should be available where, as here, the statutory remedies provided in the Internal Revenue Code (*i.e.*, a refund suit and action for declaratory relief) would not address the alleged constitutional wrongs of the I.R.S. defendants.

App. 41-43 (emphasis added).

Other courts have allowed *Bivens* actions to proceed in order to remedy punitive, retaliatory tax audits. In *Hurt v. United States*, 889 F. Supp. 248 (S.D. W.Va. 1996), the plaintiffs alleged that IRS officials violated their Fourth and Fifth Amendment rights by harassing them in retaliation for Mr. Hurt's legal representation of clients in civil actions filed

against the IRS several years earlier. *Hurt*, 889 F. Supp. at 249. The alleged harassment specifically included retaliatory tax audits, among other improper conduct. *Hurt*, 889 F. Supp. at 249. The Court expressly held that the plaintiffs could maintain a *Bivens* action against the IRS officials:

> Plaintiffs allege a pattern of retaliatory and harassing auditing and crediting practices used by the IRS against them. This is sufficient to withstand a motion to dismiss the *Bivens* claim.

Hurt, 889 F. Supp. at 252.

Courts also have allowed *Bivens* actions to proceed against IRS agents in other, non-tax collection contexts. For example, in *Kaufman v. United States*, 876 F. Supp. 1044 (E.D. Wis. 1995) the Court sustained a *Bivens* action against IRS agents who obtained a warrant to search the plaintiff's business by making knowingly false or reckless misrepresentations in an affidavit.

The Appellate Court itself suggested that a *Bivens* action should be allowed to proceed in order to remedy a punitive, retaliatory tax audit in *White v. Boyle*, 538 F.2d 1077 (4th Cir. 1976), although Judicial Watch, Inc. recognizes that *White* was decided before *Bush* and *Chilicky*.

Under a proper reading of *Bush* and *Chilicky*, the same conclusion reached by the Courts in *Cederquist*, *NCBA I*, and *NCBA II*, as well as the conclusion reached by the Appellate Court itself in *White* and the district courts in *Hurt* and *Kaufman*, should have been reached in this action. A writ of certiorari should issue to resolve the conflict between this

Court's rulings in *Bush* and *Chilicky* and the Appellate Court's January 24, 2003 ruling in this important matter.

II. A WRIT OF CERTIORARI SHOULD ISSUE TO RESOLVE THIS IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

This Court has never ruled on the important question of federal law raised by Judicial Watch, Inc.'s lawsuit, namely, whether a *Bivens* action is available to remedy politically-inspired and/or retaliatory tax audits. The interests at stake in this lawsuit -- the right to criticize the government without punishment or retaliation -- lie at the core of the freedoms protected by the First Amendment. A democratic society governed by the rule of law demands that a *Bivens* remedy be made available to protect this vital interest, and a writ of certiorari should issue to address this important concern.

III. A WRIT OF CERTIORARI SHOULD ISSUE TO RESOLVE A CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS ABOUT THIS IMPORTANT QUESTION OF FEDERAL LAW

As demonstrated in Section I, above, the Appellate Court's January 24, 2003 decision conflicts with the rulings of at least one other United States court of appeals, namely, the Tenth Circuit's decisions in *NCBA I* and *NCBA II*. It also conflicts with the Ninth Circuit concurrence of Judge Reinhardt in *Cederquist*. A writ of certiorari should issue to

resolve the conflict among the United States courts of appeals about this important question of federal law.

CONCLUSION

The misuse of the IRS for punitive, retaliatory purposes has haunted the history of our nation. The Court should take this opportunity to confirm that a *Bivens* remedy is available to victims of politically-inspired, retaliatory tax audits, not only because the Appellate Court's decision conflicts with prior related decisions of this Court concerning when *Bivens* claims should be allowed, but also because the Court has not addressed this particular, obviously important issue and the courts of appeals that have addressed the issue are divided. For these and the other compelling reasons set forth above, Judicial Watch, Inc. respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A - JANUARY 24, 2003
APPELLATE COURT OPINION

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JUDICIAL WATCH, INC.	)	
	)	
Appellant,	)	
	)	
v.	)	No. 02-1413, No. 02-1462
	)	
CHARLES O. ROSSOTTI	)	
et al.,	)	
	)	
Appellees.	)	
	)	

Appeals from the United States District Court for the District of Maryland at Baltimore. William M. Nickerson, Senior District Judge. (CA-01-2672-WMN).

317 F.3d 401; 2003 U.S. App. LEXIS 1090; 2003-1 U.S. Tax Cas. (CCH) P50,202; 91 A.F.T.R.2d (RIA) 763

December 3, 2002, Argued

January 24, 2003, Decided

DISPOSITION:
Affirmed.

COUNSEL:

ARGUED: David Barmak, MINTZ, LEVIN, COHN, FERRIS, GLOVSKY & POPEO, P.C., Reston, Virginia, for Appellant.

Gretchen M. Wolfinger, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

ON BRIEF: Erica Brown, MINTZ, LEVIN, COHN, FERRIS, GLOVSKY & POPEO, P.C., Washington, D.C., for Appellant.

Eileen J. O'Connor, Assistant Attorney General, Jonathan S. Cohen, Thomas M. DiBiagio, United States Attorney, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

JUDGES:

Before NIEMEYER, LUTTIG, and MOTZ, Circuit Judges. Judge Motz wrote the opinion, in which Judge Niemeyer and Judge Luttig joined.

OPINION BY:

DIANA GRIBBON MOTZ

OPINION:

DIANA GRIBBON MOTZ, Circuit Judge:.

In this interlocutory appeal, Judicial Watch, Incorporated, challenges the district court's dismissal of its claims for injunctive relief and money damages against the Internal Revenue Service (IRS) and certain IRS employees. Judicial Watch contends that the IRS initiated a retaliatory tax audit, intended to punish the organization for its political speech. Because the Anti-Injunction Act bars the requested injunctive relief and the law provides no damages remedy for the wrongs alleged here, we affirm.

I.

Founded in 1994, Judicial Watch describes itself as a "non-partisan legal 'watchdog' organization that relies on the Freedom of Information Act ("FOIA"), the civil discovery process, and court litigation, among other tools, to protect the American people from, and educate them about, corruption in government and abuses of power, and to enforce the principle that 'no one is above the law'."

Since 1995, Judicial Watch has operated as a tax-exempt, § 501(c)(3) organization. *See* 26 U.S.C.A. § 501(c)(3) (West 2002). The Internal Revenue Code bars such organizations from lobbying. *See id.* (requiring that qualifying organizations refrain from "carrying on propaganda, or otherwise attempting, to influence legislation ... or intervening in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office"); *see also* 26 U.S.C.A. § 504 (West 2002) (addressing status of organization that fails to

qualify for 501(c)(3) exemption because of substantial lobbying or political activities); *Regan v. Taxation with Representation for Washington*, 461 U.S. 540, 551, 76 L.Ed. 2d 129, 103 S.Ct. 1997 (1983) (affirming § 501(c)(3) ban on lobbying).

During the late 1990s, Judicial Watch filed a number of lawsuits against President and Mrs. Clinton. On September 28, 1998, in the midst of the impeachment proceedings against President Clinton, Judicial Watch submitted a report entitled "Interim Report: Crimes and Other Offenses Committed by President Bill Clinton Warranting His Impeachment and Removal from Elected Office" ("Interim Report") to members of the House Judiciary Committee. The Interim Report claimed, *inter alia*, "that the Clinton Administration had operated a campaign of retribution and retaliation against its perceived enemies, using politically inspired retaliatory tax audits as a major weapon in that campaign." The Interim Report was subsequently accepted into the Congressional Record and made an official part of the impeachment proceedings in Congress.

Several days later, Judicial Watch received a letter from the IRS, signed by Agent Donna Dorsey, stating that it had been selected for an audit. The letter was accompanied by an IRS Form 4564 Information Document Request, which requested information pertaining to the political affiliations of Judicial Watch directors. After receiving the audit letter, Judicial Watch resisted IRS efforts to proceed with the audit by filing FOIA requests, meeting with IRS officials, refusing IRS document requests, and asserting throughout that the audit constituted politically motivated retaliation.

In July 1999, the IRS informed Judicial Watch that the Service was withdrawing the audit pending an investigation by the Treasury Inspector General for Tax Administration, the independent internal monitor of IRS activities. The IRS contends, and Judicial Watch does not dispute, that the Inspector General then conducted two investigations into the asserted illegitimacy of the audit and found no evidence of impropriety by the IRS or any of the IRS employees involved in the decision to audit Judicial Watch.

Nevertheless, in September 2001, Judicial Watch filed this action in the United States District Court for the District of Maryland against former IRS Commissioner Rossotti, four individual IRS agents (Donna Dorsey, Peter Breslan, Wayne Hampel, and Steven T. Miller), and the United States. In January 2002, Judicial Watch filed an amended complaint, withdrawing its claims against the United States, but adding the Department of the Treasury and the Internal Revenue Service as defendants.

The amended complaint alleges that the audit is "retaliatory, politically-motivated, and unconstitutional," violating Judicial Watch's First Amendment free speech rights, Fifth Amendment due process rights, and Fifth Amendment right to be free of selective prosecution. The amended complaint seeks an injunction against all defendants from proceeding with the audit and compensatory and punitive damages against ex-Commissioner Rossotti and the individual agents. It also includes claims for relief in connection with Judicial Watch's FOIA requests.

In support of its constitutional claims, Judicial Watch alleges that the timing of the audit letter (four days after the

Interim Report was made an official part of Congress's impeachment proceedings), the timing of several subsequent IRS document requests pursuant to the audit, and the fact that it received final notice of its exempt status at roughly the same time that it received the audit letter, create a strong inference of retaliatory motive. Similarly, Judicial Watch cites the "extraordinary demand" contained in the IRS Form 4564 Information Document Request that Judicial Watch provide information on the political affiliations of its directors and the alleged refusal of the IRS to respond to Judicial Watch's various FOIA requests as evidence of bad faith and improper motive.

Finally, Judicial Watch refers to comments by various IRS agents that, in its view, suggest a retaliatory motive. These comments include the statement by Agent Dorsey on November 23, 1998 to counsel for Judicial Watch that the audit was a "hot potato"; the query by Agent Breslan to representatives from Judicial Watch at a meeting on January 12, 1999: "What do you expect when you sue the President?"; the asserted concession by Agent Miller that the audit and IRS's failure to respond to Judicial Watch's FOIA requests "had created at least the appearance of a problem"; and statements made during March and April 2000 by Agent Hampel that Judicial Watch was still on the IRS "radar screen."

On January 18, 2002, more than three years after sending the initial audit letter, the IRS served Judicial Watch with an administrative summons pursuant to the audit demanding production of documents within eight business days. Judicial Watch refused to comply with the summons, but instead filed another action in the district court seeking to stay or enjoin

any attempt to enforce the summons. The court subsequently consolidated the new action with the original action.

After full briefing, the district court denied Judicial Watch's motion to stay or enjoin the administrative summons and granted the defendants' motion to dismiss all claims. Because the court did not resolve the FOIA claims, Judicial Watch moved for certification of the case for immediate appeal. The district court entered the requested certification order and we, in turn, granted Judicial Watch's petition for interlocutory review. *See* 28 U.S.C.A. § 1292(a)(1) (West 1993).[1]

II.

The district court denied Judicial Watch's request for injunctive relief on the ground that the Anti-Injunction Act (sometimes herein, "the Act"), 26 U.S.C.A. § 7421 (West

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[1] Subsequent to the issuance of the district court's opinion, the Government filed a summons enforcement action in the District Court for the District of Columbia. On December 11, 2002, after extensive briefing and *in camera* review of "all documents relating to [IRS's] motivation and purpose for its proposed audit of Judicial Watch," affidavits from IRS officials and employees involved in the audit, and the reports of two investigations of the audit by the Treasury Inspector General for Tax Administration, the court resolved the action in favor of the United States, concluding that there was "no evidence of political vindictiveness or retaliatory motive." *See United States v. Judicial Watch, Inc.*, 2002 U.S. Dist. LEXIS 25197, Misc. Action No. 02-144 (ESH) (D.D.C. Dec. 11, 2002) slip op. at 3, 9-10. Judicial Watch indicates that it intends to appeal this ruling.

2002), deprived it of jurisdiction to grant such relief. We review that decision *de novo*. *Estate of Michael v. M.J. Lullo*, 173 F.3d 503, 506 (4th Cir. 1999).

The Anti-Injunction Act provides in relevant part that:

> no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

26 U.S.C.A. § 7421(a) (West 2002).

As the Supreme Court has emphasized, the language of the Act "could scarcely be more explicit," reflecting its overarching objective of protecting "the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference." *Bob Jones University v. Simon*, 416 U.S. 725, 736, 40 L.Ed. 2d 496, 94 S.Ct. 2038 (1974); *see also Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 299 (4th Cir. 2000) ("The Act has two primary objectives: 'efficient and expeditious collection of taxes with a minimum of preenforcement judicial interference, and protection of the collector from litigation pending a refund suit'." (quoting *United States v. American Friends Serv. Comm.*, 419 U.S. 7, 12, 42 L.Ed. 2d 7, 95 S.Ct. 13 (1974) (*per curiam*))), *aff'd sub nom. Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 151 L.Ed. 2d 908, 122 S.Ct. 941 (2002). The effect of the Act is simple and obvious: courts lack jurisdiction to issue injunctive relief in suits seeking to restrain the assessment or collection of taxes. *See, e.g., Estate of Michael*, 173 F.3d at 506 ("The Anti-Injunction Act withdraws all courts' jurisdiction over suits filed 'for the

purpose of restraining the assessment or collection of any tax'.").

Judicial Watch maintains that the Act does not apply to its motion to enjoin the audit (and stay or enjoin enforcement of the administrative summons issued pursuant to the audit) because an audit conducted for unlawful purposes does not constitute "assessment or collection" of a tax. Alternatively, it argues that even if the Act does apply to its request for injunctive relief, the present action falls within the judicially crafted exceptions to the Act. Both arguments fail.

A.

First, it is clear that the Anti-Injunction Act extends beyond the mere assessment and collection of taxes to embrace other activities, such as an audit to determine tax liability, that may culminate in the assessment or collection of taxes.

In *Bob Jones*, for example, the Supreme Court refused to enjoin the IRS from revoking the plaintiff's § 501(c)(3) status. 416 U.S. at 748- 49. Other courts, including this one, have also held that the Act applies broadly to include activities that are intended to or may culminate in the assessment or collection of taxes. *See, e.g., Lowrie v. United States*, 824 F.2d 827, 830 (10th Cir. 1987) ("The statute applies not only to the actual assessment or collection of a tax, but is equally applicable to activities leading up to, and culminating in, such assessment and collection."); *Dickens v. United States*, 671 F.2d 969, 971 (6th Cir. 1982) (stating that the Act "is equally applicable to activities which are intended to or may culminate in the assessment or collection of taxes"

(internal quotations marks and citations omitted)); *White v. Boyle*, 538 F.2d 1077, 1080 (4th Cir. 1976) (affirming dismissal of request for injunctive relief regardless of whether the taxpayer "sought to restrain the collection of taxes. . . or to restrain an investigation of his tax liability" (citations omitted)). Clearly, an audit to determine tax liability fits squarely within the category of activities that may culminate in the assessment or collection of taxes.

Judicial Watch attempts to distinguish these cases on the ground that in them the IRS acted on the basis of good faith tax enforcement purposes, while the audit at issue here was, according to Judicial Watch, a product of bad faith non-tax related motives. Judicial Watch further maintains that because these bad faith motives assertedly drove the decision to initiate the audit, enjoining the audit (and any judicial enforcement of the administrative summons) would not constitute an interference with the assessment or collection of taxes.

The initial difficulty with this argument is that, although the amended complaint contains general allegations of retaliatory conduct by IRS agents based on the factual chronology outlined above, the complaint does not allege that the individual IRS agents even knew that Judicial Watch had filed various lawsuits, much less its Interim Report, explicitly targeting the Clinton administration. Nor does Judicial Watch dispute that the Inspector General conducted two investigations and twice exonerated the individual IRS employees involved in the audit decision.

Moreover, the sworn declaration of Agent Dorsey, which the district court made part of the record after issuance of its

decision in this case at the request of Judicial Watch and which Judicial Watch urges us to consider, severely undermines Judicial Watch's general allegations of retaliation. In her declaration, Dorsey, who signed the initial audit letter, states that the decision to audit Judicial Watch was made in December 1997 (more than nine months *before* the impeachment proceedings); that when first assigned the Judicial Watch audit in July 1998 she had never heard of the organization; that, except for an initial instruction to coordinate her work on the audit with IRS District Counsel in Baltimore, she never received any "instructions, directions, indications, or suggestions from anyone to treat Judicial Watch, Inc. differently than any other taxpayers" during the course of her work on the case; that she never had any contact with then Commissioner Rossotti or his office or with the President or the Vice President, or their offices; and that she did not follow and was not aware of any role that Judicial Watch played in the impeachment of President Clinton.[2]

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[2] The district court also permitted Judicial Watch to supplement the record with numerous complaints by citizens to various elected officials regarding Judicial Watch's political activities, and referral of those complaints to the IRS. The citizens assert that based on fundraising materials received from Judicial Watch, they believe that the organization engaged in partisan political activity not permitted of a § 501(c)(3) tax-exempt organization. These materials do not support Judicial Watch's contentions that the IRS or its agents acted improperly. They simply evidence constituent service, which our political system accepts and even applauds. Judicial Watch places particular emphasis on "an August 14, 1998 e-mail" complaint of this sort "from a purported Clinton supporter to President Clinton" and documents indicating that

Judicial Watch does not dispute any of these assertions. We also can take judicial notice that in its recent decision granting the IRS's summons enforcement request, the district court in the District of Columbia concluded, on the basis of a "voluminous record," that there was "no evidence of political vindictiveness or a retaliatory motive." *United States v. Judicial Watch, Inc.*, 2002 U.S. Dist. LEXIS 25197 at *4, Misc. Action No. 02-144 (ESH) (D.D.C. Dec. 11, 2002), slip op. at 2-3. Thus, Judicial Watch's argument that the IRS acted with bad faith motives unrelated to enforcement of the tax law finds little support in the record.

More importantly, Judicial Watch misunderstands the impact of allegations that the IRS acted with bad faith, non-tax related motives. Such allegations do not render the Anti-Injunction Act inapplicable. In *Bob Jones* itself, the taxpayer contended, when seeking to enjoin the IRS, that "the Service's threatened action was outside its lawful authority and would violate petitioner's rights to the free exercise of religion, to free association, and to due process and equal protection of the laws." *Bob Jones*, 416 U.S. at 736. The Supreme Court recognized this "attribution of non-tax-related motives to the

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the Office of the President forwarded this e-mail to then IRS-Commissioner Rossotti's office. Supp. Brief of Appellant at 3-4. However, as noted in text above, regardless of the lawfulness of this communication by the President or his office (and Judicial Watch maintains that it violates 26 U.S.C.A. § 7217 (West 2002)) nothing in the record indicates it had any effect on the IRS's decision to audit Judicial Watch. Indeed, according to Agent Dorsey's undisputed sworn statement, the IRS decided to audit Judicial Watch in December 1997 -- eight months before the date of the e-mail.

Service," but concluded that the attribution "ignored the fact that the [taxpayer] had not shown that the Service's action was *without an independent basis in the requirements of the Code*." *Id.* at 740 (emphasis added). The Court explained that if the IRS action represents "a good-faith effort to enforce the technical requirements of the tax laws," other additional motives for its actions do not eliminate the prohibition in the Anti-Injunction Act. Id. Thus, despite the petitioner's efforts to circumvent the restrictions of the Anti-Injunction Act by attributing a non-tax-related purpose to the IRS's actions, the *Bob Jones* Court concluded that the Act did apply and proceeded to determine if the request for injunctive relief qualified for an exception to the Act. *Id.* at 748-49.

Accordingly, unless Judicial Watch qualifies for one of two exceptions to the Anti-Injunction Act, the district court properly concluded that the Act stripped it of jurisdiction necessary to issue the requested injunctive relief.

B.

The Supreme Court established the first exception to the Act in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 8 L.Ed. 2d 292, 82 S.Ct. 1125 (1962), "the capstone to judicial construction of the Act." *Bob Jones*, 416 U.S. at 742. In *Williams Packing*, the taxpayer requested an injunction to prevent the IRS from collecting past due social security and unemployment taxes. Although the Supreme Court reversed a lower court's grant of injunctive relief, the Court held that such actions could proceed, despite the Anti-Injunction Act, if, but only if, the plaintiff could show that (1) "under no circumstances could the Government ultimately prevail," and (2) "equity jurisdiction otherwise exists."

Williams Packing, 370 U.S. at 7. Moreover, the Court directed that in analyzing the initial factor, a court must determine, "on the basis of the information available to [the Government] at the time of the suit," whether, "under the most liberal view of the law and the facts, the United States cannot establish its claim." *Id.*; *see also Estate of Michael*, 173 F.3d at 506.

Judicial Watch simply cannot establish that "under no circumstances could the Government ultimately prevail." *Williams Packing*, 370 U.S. at 7. Section 501(c)(3) provides an explicit basis for the IRS to investigate Judicial Watch's tax-exempt status and determine if its "political" activities merit a change in its status. As the district court concluded, taking the most liberal view of the law and the facts, it is quite possible (even "plausible") that the IRS initiated and has continued to pursue the audit because it was "legitimately suspicious" that Judicial Watch's "earnest efforts to assist in the impeachment of President Clinton" constituted the sort of "prohibited political activity" not permitted any organization afforded § 501(c)(3) status. As in *Bob Jones*, therefore, regardless of any additional, improper non-tax related purpose, Judicial Watch has not and cannot demonstrate that the IRS action does not reflect, at least in part, "a good faith effort to enforce the technical requirements of the tax laws." *Bob Jones*, 416 U.S. at 740. Thus, without deciding the merits of Judicial Watch's claims, we must conclude that its contentions "are sufficiently debatable to foreclose any notion that under no circumstances could the Government ultimately prevail." *Id.* at 749.

Nor can Judicial Watch find refuge in the other exception to the Anti-Injunction Act, that created in *South Carolina v.*

Regan, 465 U.S. 367, 375, 79 L.Ed. 2d 372, 104 S.Ct. 1107 (1984). There, South Carolina sought an injunction against a tax on the ground that a provision of the Code regarding state-issued bonds violated the Constitution. The Supreme Court held that if the Anti-Injunction Act applied, South Carolina would have had to depend on third parties to raise the State's constitutional challenge in their tax refund suits. *Id.* at 379-80. The Court reasoned that the Act could not stand as a barrier to injunctive relief in situations "where ... Congress has not provided the plaintiff with an alternative legal way to challenge the validity of the tax." *Id.* at 373.[3]

Of course, the basis of the *Regan* exception is *not* whether a plaintiff has access to a legal remedy for the precise harm that it has allegedly suffered, but whether the plaintiff has any access at all to judicial review. As the *Regan* Court

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[3] Because of the strong policy animating the Anti-Injunction Act, and the sympathetic, almost unique, facts in *Regan*, courts have construed the *Regan* exception very narrowly, undermining Judicial Watch's efforts to fit its own claims within the confines of this exception. *See, e.g., American Bicycle Ass'n v. United States (In re American Bicycle Ass'n)*, 895 F.2d 1277, 1281 (9th Cir. 1990) ("Promoting the purpose behind the Act requires a strict construction of any possible exceptions."); *Leves v. IRS*, 796 F.2d 1433, 1434 (11th Cir. 1986) (refusing to extend the exception because *Regan* "involved the rights of third parties to litigate the tax liability of persons against whom the tax was assessed"); *American Society of Ass'n Executives v. Bentsen*, 848 F. Supp. 245, 250 (D.D.C. 1994) (noting that the exception announced in *Regan* "is a narrow one tailored to the unique factual pattern in that case").

explained, "the indicia of congressional intent -- the [Anti-Injunction] Act's purposes and the circumstances of its enactment -- demonstrate that Congress did not intend the Act to apply where an aggrieved party would be required to depend on the mere possibility of persuading a third party to assert his claims." 465 U.S. at 381. The Act does apply, however, whenever Congress has provided "an alternative avenue for an aggrieved party to litigate its claims on its own behalf." *Id.*

This case differs markedly from *Regan*. Judicial Watch does not challenge the validity of any provision of the Code, but only seeks to avoid an audit to determine its tax liability. Judicial Watch need not depend on third parties to pursue this claim, a fact reflected in its efforts to resist the audit in the summons enforcement proceedings in the District of Columbia. *See supra* n.1. Moreover, the Code also provides that organizations whose exempt status under 501(c)(3) has been denied or revoked can seek declaratory relief. *See* 26 U.S.C.A. § 7428 (West 2002). Although Judicial Watch may not like the avenues Congress has provided for challenging an audit, it simply cannot maintain that it has no avenue for doing so.

In sum, the claims for injunctive relief asserted by Judicial Watch do not fall within the narrow exceptions carved out in *Williams Packing* or *Regan*. Strong policy reasons support this result. Extending the recognized exceptions to the Anti-Injunction Act to include requests for injunctive relief like that of Judicial Watch would threaten a flood of lawsuits brought against the IRS by those seeking to enjoin an audit they believed to be wrongful, creating precisely the kind of

judicial interference with the assessment and collection of taxes that the Act was designed to prevent.

III.

Judicial Watch also contends that the district court erred in dismissing its *Bivens* action for money damages against the individual defendants. *See Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 396-97, 29 L.Ed. 2d 619, 91 S.Ct. 1999 (1971).[4]

In *Bivens*, the Supreme Court found that the Fourth Amendment contained an implied private cause of action for damages against federal narcotics agents who allegedly conducted an illegal search and seizure. See *Bivens*, 403 U.S. at 397. The Court concluded that it could recognize this new constitutional tort because, although Congress had never provided for such a private right of action, "no explicit congressional declaration" prohibited it, and "no special factors counseled hesitation [by the Court] in the absence of affirmative action by Congress." *Id.* at 396-97.

In the more than thirty years since *Bivens*, the Court has been very hesitant to imply other private actions for money damages. Indeed, the Court has only recognized two other such actions -- one under the Due Process Clause of the Fifth Amendment, *Davis v. Passman*, 442 U.S. 228, 245-49, 60 L.Ed. 2d 846, 99 S.Ct. 2264 (1979) (finding *Bivens* remedy

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[4] The district court concluded that the individual defendants were entitled to qualified immunity on the alleged *Bivens* claims. Because we find no *Bivens* action lies in this case, we do not reach the question of qualified immunity.

for alleged violation of due process rights because of gender discrimination by United States Congressman in terminating petitioner's employment), and one under the Cruel and Unusual Punishment Clause of the Eighth Amendment, *Carlson v. Green*, 446 U.S. 14, 18-23, 64 L.Ed. 2d 15, 100 S.Ct. 1468 (1980) (finding *Bivens* remedy for federal prisoner who was allegedly deprived of potentially life-saving treatment in violation of his Eighth Amendment rights). Instead, the Court has directed its attention to cabining the *Bivens* doctrine. *See Correctional Services Corp. v. Malesko*, 534 U.S. 61, 122 S.Ct. 515, 520, 151 L.Ed. 2d 456 (2001) ("Since *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants.").

The Court's refusal to extend *Bivens* has been especially apparent in cases involving complex statutory schemes in which Congress has considered and created meaningful avenues for redress. Thus, in *Bush v. Lucas*, 462 U.S. 367, 76 L.Ed. 2d 648, 103 S.Ct. 2404 (1983), the Court refused to find an implied *Bivens* remedy for federal employees alleging that their supervisors violated their First Amendment rights. Because these claims arose out of a "relationship ... governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States," the Court concluded that "it would be inappropriate ... to supplement that regulatory scheme with a new judicial remedy." *Id.* at 368.

Similarly, in *Schweiker v. Chilicky*, 487 U.S. 412, 101 L.Ed. 2d 370, 108 S.Ct. 2460 (1988), the Court declined to find a new *Bivens* remedy for claimants whose Social Security disability benefits had been improperly terminated. Given the

"elaborate remedial scheme devised by Congress" to deal with the improper denial or termination of disability benefits, the Court saw no reason to tread on congressional prerogatives by creating a new judicial remedy for the particular harm suffered by the claimants. *Id.* at 414. In reviewing the development of *Bivens* jurisprudence, the Court concluded:

> the concept of "special factors counseling hesitation in the absence of affirmative action by Congress" has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent. When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.

Id. at 423. Thus, in *Chilicky*, even though "Congress had failed to provide for '*complete* relief" for the disability claimants, the Court refused to create a *Bivens* remedy because Congress had provided some "*meaningful* safeguards or remedies." *Id.* at 425 (emphasis added).

Following these precedents, we too have refused to extend *Bivens*. *See, e.g.*, *Hall v. Clinton*, 235 F.3d 202, 204 (4th Cir. 2000) (declining to create a Fifth Amendment *Bivens* remedy for White House employee because Congress had already established an exclusive statutory remedy); *Zimbelman v. Savage*, 228 F.3d 367, 371 (4th Cir. 2000) (finding that special factor of federal employment counseled against creating a *Bivens* remedy for Air Force personnel alleging unfair termination of employment based on false accusations).

In adjudicating claims requesting the creation of new *Bivens* remedies, we have gleaned from the above Supreme Court precedent a threepart test:

> in order for a *Bivens* remedy to be available, a court must determine that (1) Congress has not already provided an exclusive statutory remedy; (2) there are no "special factors counseling hesitation in the absence of affirmative action by Congress"; and (3) there is no "explicit congressional declaration" that money damages not be awarded.

Hall, 235 F.3d at 204 (citations omitted). Moreover, we have noted that "the 'special factors concept' includes an appropriate judicial deference to indications that congressional inaction has not been inadvertent'." *Id.* (citations omitted). Accordingly, we apply these factors to this case to determine whether Congress has sufficiently attended to the rights and remedies available to taxpayers in the context of the Internal Revenue Code to foreclose judicial creation of additional remedies.

It would be difficult to conceive of a more comprehensive statutory scheme, or one that has received more intense scrutiny from Congress, than the Internal Revenue Code. In constructing this vast and exceedingly complex statutory apparatus, moreover, "Congress has given taxpayers all sorts of rights against an overzealous officialdom." *Cameron v. Internal Revenue Service*, 773 F.2d 126, 129 (7th Cir. 1985); *see also McMillen v. United States*, 960 F.2d 187, 190 (1st Cir. 1991). Thus, the Code provides Judicial Watch with a number of ways to challenge actions of the IRS as well as those of individual agents.

As noted above, in response to an audit or other activities involved in the investigation of its tax liability, Judicial Watch could simply resist the audit, force the IRS to initiate a summons enforcement proceeding, and then challenge the validity of the audit in that forum. *See* 26 U.S.C.A. § 7604(a) (West 2002). (Indeed, Judicial Watch has done precisely this in the District of Columbia.) In the event that an audit led to revocation of Judicial Watch's 501(c)(3) status, the organization could seek declaratory relief. *See* 26 U.S.C.A. § 7428. Furthermore, to the extent that the audit culminated in the determination and assessment of a tax deficiency, Judicial Watch could pursue an internal appeal with the Service pursuant to 26 C.F.R. § 601.106 (2002); pay the tax in full and sue for a refund in a federal district court pursuant to 26 U.S.C.A. § 7422 (West 2002); or contest the deficiency in Tax Court pursuant to 26 U.S.C.A. § 6213(a) (West 2002). Finally, Judicial Watch could also contest IRS actions during the collection process by requesting a hearing before the IRS Office of Appeals and seeking subsequent judicial review of any adverse determination pursuant to 26 U.S.C.A. § 6330(b) (West 2002).

With respect to alleged misconduct by individual IRS employees, Congress has also provided for a variety of "safeguards and remedies." *Chilicky*, 487 U.S. at 425. Specifically, Congress created the Treasury Inspector General for Tax Administration, an entity separate and distinct from the IRS, with responsibility for investigating allegations of misconduct by IRS employees. *See* 5 U.S.C.A. App. 3 § 2 (West 1996 and West Supp. 2002). In this case, the Inspector General conducted not one, but two, investigations -- both of which found no support for Judicial Watch's allegations that the IRS initiated the audit for purposes of political retaliation.

See United States v. Judicial Watch, Inc., 2002 U.S. Dist. LEXIS 25197 at *22, Misc. Action No. 02-144 (ESH) (D.D.C. Dec. 11, 2002) slip op. at 22.

Moreover, Congress has also provided a civil damages action for misconduct by IRS employees in connection with the collection of taxes. *See* 26 U.S.C.A. § 7433 (West 2002). Originally enacted in 1988 as part of the "Taxpayer Bill of Rights" (the name itself speaks volumes about Congress's explicit consideration of the remedies available to taxpayers), § 7433 states in pertinent part:

> If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

26 U.S.C.A. § 7433 (West 2002).

To be sure, § 7433 provides for a "civil action" only for damages arising from the "collection" of taxes, not for damages arising from the investigation and determination of tax liability. That Congress chose not to create certain remedies as part of the complex statutory scheme regulating the relationship between taxpayers and the IRS lends Judicial

Watch little support, however. As the Supreme Court put the matter,

> the question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue. That question obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff.

Bush, 462 U.S. at 388.

The legislative history of § 7433 further suggests that Congress did not act inadvertently in failing to create an action for damages allegedly arising from the investigation or determination of tax liability. As originally introduced into the Senate, the draft provision that ultimately became § 7433 contained broader language permitting civil damages actions "in connection with any determination or collection of Federal tax" and in violation of "any provision of Federal law." S. 2223, 100th Cong., 2d Sess. § 123 (1988). The Conference Report regarding § 7433 explained that the final version was

> limited to reckless or intentional disregard in connection with the collection of tax. An action under this provision may not be based on alleged reckless or intentional disregard in connection with the determination of a tax. ... The provision is limited to reckless or intentional disregard of the Internal

> Revenue Code and the regulations thereunder. An action may not be brought under this provision based on an alleged violation of a Federal law other than the Internal Revenue Code or a regulation promulgated thereunder.

H. R. Conf. Rep. No. 100-1104, at 229 (1988), reprinted in 1988-3 C.B. 473, 719. Thus, it appears that Congress has indeed considered, and rejected, a broader damages remedy that would have covered wrongful actions by IRS agents in the course of an audit.

Taken together, therefore, Congress's considerable attention to the rights and remedies available to taxpayers and the Supreme Court's hesitancy in creating *Bivens* remedies in such circumstances provide strong support for the conclusion that no *Bivens* remedy lies in this case. This conclusion comports with the view of a number of our sister circuits. *See, e.g.*, *Shreiber v. Mastrogiovanni*, 214 F.3d 148, 152-53 (3d Cir. 2000) (declining to extend a *Bivens* remedy to taxpayer who allegedly suffered violation of constitutional rights in connection with assessment of tax liability); *Dahn v. United States*, 127 F.3d 1249, 1254 (10th Cir. 1997) (stating that "in light of the comprehensive administrative scheme created by Congress to resolve tax related disputes, individual agents of the IRS are also not subject to *Bivens* actions"); *Fishburn v. Brown*, 125 F.3d 979, 982-83 (6th Cir. 1997) (declining to create *Bivens* action against IRS agents for alleged due process violations during property seizure); *Vennes v. An Unknown Number of Unidentified Agents of the United States*, 26 F.3d 1448, 1454 (8th Cir. 1994) (declining to create *Bivens* action against IRS agents for alleged

violation of due process rights during seizure of business and jeopardy assessment).

Judicial Watch, however, correctly notes that none of these cases address whether a *Bivens* action is available for damages arising from an allegedly retaliatory audit, and contends that such an audit presents a far stronger claim to *Bivens* relief. In support of this contention, Judicial Watch cites our decision in *White v. Boyle*, 538 F.2d 1077 (4th Cir. 1976). There, we suggested in dicta that a *Bivens* remedy should be available to a taxpayer alleging a retaliatory investigation of his tax liability. *Id.* at 1079 ("Clearly, if [the taxpayer] can demonstrate an injury consequent upon the violation by federal agents of his constitutionally protected rights, absent official immunity, he is entitled to recovery."). But we decided *White* more than a decade before *Chilicky*, and did not attempt to analyze whether the factors explicated in *Bivens* and *Chilicky* counseled recognition of a *Bivens* action for damages assertedly arising from a retaliatory audit.

Indeed, no appellate court has ever reached that question. Recently, the Ninth Circuit specifically declined to do so because limitations barred the claim in any event. *See Western Center for Journalism v. Cederquist*, 235 F.3d 1153 (9th Cir. 2000). In that case, Judge Reinhardt issued a concurring opinion explaining that he believed a *Bivens* action did lie for damages resulting from a retaliatory audit. *Id.* at 1159 (distinguishing *Chilicky* and *Bush* because in those cases Congress afforded some, even if not complete, relief for constitutional violations, while in the case of an assertedly discriminatory audit, "Congress has created no remedy at all"). This view finds some support in *National Commodity & Barter Ass'n v. Archer*, 31 F.3d 1521 (10th Cir. 1994),

which allowed a *Bivens* action on claims that harassment by IRS agents violated the plaintiffs' First and Fourth Amendment rights. Employing reasoning similar to that of Judge Reinhardt, the Tenth Circuit concluded that in situations where the Code does not provide any mechanism for compensation, IRS agents are not shielded from liability simply because the Code contains remedies for other, unrelated violations. *Id.* at 1530-32.

But neither *Cedarquist* nor *Archer* contains any discussion of § 7433, much less its legislative history evidencing Congress's considered decision to forego creating a damages remedy for misconduct by IRS employees in connection with the determination of taxes. Moreover, circuit precedent forecloses adoption of the *Cedarquist Archer* view here. We have recently held that even though a federal statutory scheme (the Civil Service Reform Act) provided the plaintiffs with *no* remedy (because of a statutory exemption), its "comprehensiveness" precluded any *Bivens* claim. *See Zimbelman*, 228 F.3d at 370-71.

Our view seems consistent with Supreme Court teaching in this field. We note that the Court has never required that the remedies available in the context of a larger statutory scheme be perfect; just that they be "meaningful." *See Chilicky*, 487 U.S. at 428 (recognizing that although "suffering months of delay in receiving the income on which one has depended for the very necessities of life cannot be fully remedied by the belated restoration of back benefits" the fact that Congress had made compromises involved in administering a vast and complex government program meant that there was no basis for judicial intervention (internal quotation marks omitted)). Even if "Congress has provided

a less than complete remedy for the wrong," any decision to create a new judicial remedy must be "exercised in the light of relevant policy determinations made by the Congress." *Bush*, 462 U.S. at 373; *see also Malesko*, 122 S.Ct. at 520 ("So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability." (citations omitted)). That Judicial Watch considers its existing remedies insufficient is simply irrelevant. *See Zimbelman*, 228 F.3d at 371 ("It is not relevant that plaintiffs believe the procedures governing their employment relationship were insufficient.").

We conclude, therefore, that in this case "it would be inappropriate to supplement [the] regulatory scheme with a new judicial remedy" for alleged retaliatory tax audits. *Bush*, 462 U.S. at 368. As in *Chilicky*, although "the creation of a *Bivens* remedy would obviously offer the prospect of relief for injuries that must now go unredressed," the fact that Congress "has not failed to provide meaningful safeguards or remedies for the rights of persons" similarly situated counsels against any judicial extension of *Bivens* liability. *Chilicky*, 487 U.S. at 425. Indeed, the fact that Congress explicitly considered allowing damages claims under § 7433 for misconduct in connection with the *determination* of taxes but decided to restrict those actions to the *collection* of taxes strongly suggests "that congressional inaction has not been inadvertent." *Id.* at 423. We thus decline "to create a new substantive legal liability ... because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it." *Id.* at 426-27 (quoting *Bush*, 462 U.S. at 390).

IV.

For the reasons set forth within, the judgment of the district court is *AFFIRMED*

APPENDIX B - MARCH 24, 2003
APPELLATE COURT'S ORDER DENYING
PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JUDICIAL WATCH, INC.	)	
	)	
Appellant,	)	
	)	
v.	)	No. 02-1413, No. 02-1462
	)	
CHARLES O. ROSSOTTI	)	
et al.,	)	
	)	
Appellees.	)	
	)	

Filed March 24, 2003

On Petition for Rehearing En Banc

The appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied

For the Court,

/s/ Patricia S. Connor

Clerk

APPENDIX C - MARCH 27, 2002

DISTRICT COURT MEMORANDUM OPINION AND ORDER

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

JUDICIAL WATCH, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. WMN-01-2672
	)	
CHARLES O. ROSSOTTI *et al.*,	)	
	)	
Defendants.	)	
	)	

217 F. Supp. 2d 618, 2002 U.S. Dist. LEXIS 16193

March 27, 2002 , Decided

COUNSEL:

For JUDICIAL WATCH, INC., plaintiff: David Barmak, Joanne B Jarquin, Mintz Levin Cohn Ferris Glovsky and Popeo PC, Reston, VA USA.

For DEPARTMENT OF THE TREASURY, THE INTERNAL REVENUE SERVICE, defendants: Stuart D

Gibson, United States Department of Justice, Washington, DC USA.

JUDGES: William M. Nickerson, United States District Judge.

OPINION BY: William M. Nickerson

OPINION:

MEMORANDUM

Before the Court are Plaintiff's Motion to Stay or Enjoin Enforcement of Administrative Summons (Paper No. 11) and a Motion to Dismiss filed by Defendants Rossotti, Dorsey, Breslan, Hampel, and Miller ("Individual Defendants" or "Defendants") (Paper No. 13). The motions have been exhaustively briefed and are ripe for decision. Upon review of the pleadings and applicable case law, the Court determines that no hearing is necessary (Local Rule 105.6), and that Plaintiff's motion will be denied and Defendants' motion will be granted.

I. BACKGROUND

This is a highly unusual case that, at its heart, is about an organization seeking to stop the Internal Revenue Service from auditing it. The claims set forth in Plaintiff's Amended Complaint[1] are in the form of a detailed chronology of events,

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[1] Plaintiff's Amended Complaint, filed on January 9, 2002, contains factual allegations about events that occurred since Plaintiff filed its initial Complaint in September, 2001.

much of which is recited here in order to provide context for this dispute.

Plaintiff describes itself as a "non-partisan legal 'watchdog' organization that relies on the Freedom of Information Act ("FOIA"), the civil discovery process, and court litigation, among other tools, to protect the American people from, and educate them about, corruption in government and abuses of power, and to enforce the principle that 'no one is above the law". Amended Complaint at P 2. Judicial Watch was founded in 1994, and in 1995 obtained a ruling from the I.R.S. that it met the requirements for tax exemption as an organization described in 26 U.S.C. § 501(c)(3).[2] *See*, Amended Complaint at Exh. B.

Pursuant to Fed. R. Civ. P. 15(d), parties wishing to supplement their pleadings in such a fashion must file a motion, and the court must grant leave to file the amended pleading. Although Plaintiff failed to file a motion for leave to file, the Court finds that Defendants suffer no prejudice by the Court's acceptance of the Amended Complaint.

[2] The 501(c)(3) exemption applies, in pertinent part, to:

> corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes ..., no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation ...,

In the amended complaint, Plaintiff describes some of its activities, stating that "Judicial Watch has filed over eighty public interest lawsuits concerning the President, Mrs. Clinton, and/ or the Clinton Administration, and other high government officials of all political parties." Amended Complaint at P 13. Plaintiff further states that its activities "are not limited to the Clinton Administration." *Id.* at P 14. The complaint describes an alleged "pattern of abuses of power" by the Clinton Administration, which Judicial Watch says it uncovered, including the administration's manipulation of I.R.S. officials to retaliate against its political enemies by auditing them. *Id.* at PP 15, 16. These alleged abuses were documented by Judicial Watch in a September, 1998, report entitled "Crimes and Other Offenses Committed by President Bill Clinton Warranting His Impeachment and Removal from Elected Office." *Id.* at P 17. Judicial Watch submitted the report to members of the U.S. House of Representatives Committee on the Judiciary, during impeachment proceedings against President Clinton in October, 1998. *Id.*

Just a few days later, Judicial Watch received a letter, signed by Defendant Dorsey, an I.R.S. agent, informing Plaintiff that it had been selected for an audit. *Id.* at P 20. The letter explains that the purpose of the audit is, inter alia, "to determine that the organization is operating in the manner stated and for the purpose set forth in its application for recognition of exemption." *Id.* at Exh. A (October 5, 1998

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and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

Letter). Plaintiff claims that the document request accompanying the letter asking Judicial Watch to reveal the names, addresses, and political affiliations of its directors, was an "extraordinary demand" evidencing the retaliatory nature of the audit. *Id.* at P 21. Plaintiff alleges that the audit letter was sent at the request of President Clinton's Executive Office, in retaliation for Judicial Watch's accusations. *Id.* at P 23.

Since the receipt of the audit letter, Plaintiff has resisted the I.R.S.'s efforts to conduct the audit. On October 14, 1998, Plaintiff sent comprehensive FOIA requests to the I.R.S., seeking access to all documents that "refer or relate" to Judicial Watch or its founder "in any way." *Id.* at P 25. According to Plaintiff, the I.R.S. has not fully responded to these requests. *Id.* Plaintiff also met with various I.R.S. officials, including some of the Defendants, in late 1998 and early 1999, to discuss the audit. At a November, 1998, meeting, Plaintiff alleges that Defendant Dorsey said the audit was "a hot potato" and that she had received phone calls from I.R.S. "higher ups" about it. *Id.* at P 26. Plaintiff also claims that at a January, 1999 meeting, Defendant Breslan, another I.R.S. agent, told Judicial Watch representatives, "What do you expect when you sue the President?" and commented that if Judicial Watch scrutinizes the government, the government will scrutinize Judicial Watch. *Id.* at PP 27, 28.

In May, 1999, the I.R.S. refused Judicial Watch's request to meet with then-Commissioner Rossotti. *Id.* at P 33. Plaintiff was also informed that its concerns about the audit being retaliatory had been forwarded to the Treasury Inspector General for Tax Administration (TIGTA), the internal monitor of I.R.S. activities. *Id.* At a later meeting with the

Acting Director for Exempt Organizations, Defendant Steven Miller, Plaintiff claims that Mr. Miller "conceded that the I.R.S.'s conduct had created at least the appearance of a 'problem'." *Id.* at P 35. Approximately one month later, in July of 1999, Plaintiff was informed by Defendant Agent Hampel that the audit was being withdrawn pending the TIGTA investigation.[3]

The next sequence of events set forth in the Amended Complaint describes a proceeding in litigation filed by Judicial Watch, in which a White House employee testified about the White House's failure to provide incriminating email evidence in response to subpoenas. *Id.* at P 37. Plaintiff describes the result of this testimony as "a barrage of very negative press and legal ramifications for President and Mrs. Clinton and the White House." *Id.* at P 39. According to Plaintiff, Defendant Hampel then "immediately" contacted Judicial Watch's outside counsel to "remind" him that Plaintiff was still on the "radar screen" for an audit. *Id.* at P 40. Defendant Hampel allegedly issued another reminder a few months later, shortly after a court in the above-mentioned proceedings issued a ruling that was adverse to the Clinton administration. *Id.* at P 43.

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[3] According to the Individual Defendants, TIGTA completed two investigations into the propriety of the Judicial Watch audit, and exonerated all of the I.R.S. employees involved. *See*, Defs.' Mot. to Dismiss at 7. Plaintiff does not dispute this statement.

Following more correspondence[4] between Plaintiff and the I.R.S. during 2000, Defendant Miller agreed to further delay consideration of the audit until President Clinton left office on January 20, 2001. *Id.* at PP 45-48. On January 8, 2001, however, the I.R.S. sent Judicial Watch a letter stating that the audit was continuing, and asking that documents be submitted to the I.R.S. by January 30, 2001. *Id.* at Exh. I (January 8, 2001, Letter). Judicial Watch did not comply with this request, and proceeded to submit third, fourth, and fifth FOIA requests to the I.R.S., essentially requesting any and all documents related to Judicial Watch. *Id.* at PP 51, 52, and 54. Then, according to Plaintiff, the I.R.S. sent another document request to Judicial Watch in August, 2001, approximately three weeks after the organization filed suit against then-Commissioner Rossotti in a separate action. *Id.* at P 56.

In September, 2001, Plaintiff filed the instant action against then-Commissioner Rossotti, four individual I.R.S. agents (Donna Dorsey, M. Peter Breslan, Wayne Hampel, and Steven T. Miller), and the I.R.S. itself.[5] The crux of Plaintiff's claims is that the I.R.S. audit is "retaliatory, politically-motivated, and unconstitutional." Amended Complaint at P 1. Count 1 alleges that the audit violates Plaintiff's freedom of speech and association guaranteed by the First Amendment of the United States Constitution, by punishing Plaintiff for its

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[4] On April 14, 2000, Judicial Watch sent a second FOIA request to the I.R.S., and on April 19, 2000, Judicial Watch received a renewed notice of the planned audit with a "voluminous document request." *Id.* at PP 45, 46.

[5] The complaint originally also named the United States as a defendant, but the Amended Complaint does not.

political speech. Count 2 asserts a violation of Plaintiff's Fifth Amendment rights to due process, and Count 3 brings a selective prosecution claim. These three counts name each of the Individual Defendants, and in them Plaintiff seeks monetary and injunctive relief.[6] More specifically, Plaintiff requests that "Defendants be preliminarily and permanently enjoined from pursuing the proposed retaliatory, politically-motivated audit and their other retaliatory actions." Amended Complaint, P. 23-24. Plaintiff identifies its damages as including the loss of staff hours and resources in responding to the proposed audit. *Id.*

On January 18, 2002, Judicial Watch was served by the I.R.S. with an administrative summons demanding production of documents within eight business days. Plaintiff did not comply with the summons, and has filed the instant motion to stay or enjoin any attempt by the I.R.S. to initiate administrative enforcement proceedings against Judicial Watch. A few days later, the Individual Defendants filed the instant motion to dismiss all claims against them.

II. LEGAL STANDARD FOR MOTION TO DISMISS

When reviewing a motion to dismiss, the court must assume all of the allegations to be true, must resolve all doubts and inferences in favor of the plaintiff, and must view the allegations in a light most favorable to the plaintiff. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243-44 (4th Cir. 1999). The complaint should not be dismissed unless it

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[6] Counts 4 and 5 are brought against Defendant I.R.S. pursuant to FOIA, and are not before the Court on the instant motions.

appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). Finally, in ruling on the motion, the Court should consider only the allegations contained in the complaint, the exhibits to the complaint, matters of public record, and other similar materials that are subject to judicial notice. *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1312 (4th Cir. 1995), vac. on other grounds, 517 U.S. 1206 (1996).

III. DISCUSSION

A. Injunctive Relief

The Individual Defendants argue that the Internal Revenue Code's Anti-Injunction Act ("the Act"), 26 U.S.C. §7421(a), precludes this Court from exercising subject matter jurisdiction over Plaintiff's claims for injunctive relief. The Act provides that "no suit for the purposes of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a).[7] The Supreme Court has noted that although the Act has no recorded legislative history, "its language could scarcely be more explicit." *Bob Jones University v. Simon*, 416 U.S. 725, 736, 40 L. Ed. 2d 496, 94 S.Ct. 2038 (1974). The Court has observed that the primary purpose of the Act is "the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-

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[7] The Act contains several statutory exceptions, none of which is applicable to this case.

enforcement judicial interference, 'and to require that the legal right to the disputed sums be determined in a suit for refund". *Id.* (quoting *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7, 8 L.Ed. 2d 292, 82 S.Ct. 1125 (1962)).

Plaintiff first argues that this is not a suit "for the purposes of restraining the assessment or collection of any tax" and therefore the Act does not apply. Rather, Plaintiff contends that the purpose of its suit is to block an allegedly unconstitutional audit. Any taxes that may be assessed as a result of the audit, Plaintiff claims, are immaterial to the constitutional issues at hand. The Supreme Court already considered a similar claim in *Bob Jones University*, however, in which it held that the Act barred the plaintiff's constitutional claims to enjoin the I.R.S. from withdrawing plaintiff's 501(c)(3) status. 416 U.S. at 748-49. It seems only logical that if courts cannot enjoin the I.R.S. from revoking an organization's tax-exempt status, courts similarly cannot enjoin the I.R.S. from conducting an audit to determine whether or not such a revocation is merited. *See, Dickens v. United States*, 671 F.2d 969, 971 (6th Cir. 1982) (observing that the Act "is equally applicable to activities which are intended to or may culminate in the assessment or collection of taxes") (internal citations omitted). Notably, Plaintiff has not cited a single case in which a federal court enjoined an I.R.S. audit.

In the alternative, Plaintiff argues that its claims fall within one or both of the two judicially-created exceptions to the Act. First, under the test announced in *Enochs v. Williams Packing*, an action for injunctive relief may proceed, notwithstanding the Act, if the plaintiff can show: (1) that "under no circumstances could the Government ultimately

prevail," and (2) that "equity jurisdiction otherwise exists." 370 U.S. at 7. Here, Plaintiff cannot satisfy the first prong of the test. In considering this prong, the court must liberally interpret the law and the facts in favor of Defendants. *Id.* Even without this proviso, however, a plausible reading of the Amended Complaint is that the I.R.S., upon discovery of Plaintiff's earnest efforts to assist in the impeachment of President Clinton, became legitimately suspicious as to whether Judicial Watch was operating within the confines of §501(c)(3) as it relates to prohibited political activity. *See supra* note 2. Plaintiff's chronology of events, while intended to show a pattern of retaliation, also reveals that from 1998 to the present, Judicial Watch frequently criticized or sued members of the Clinton administration, and the I.R.S. continued to pursue the audit by various means.

The second recognized exception to the Act was announced by the Supreme Court in *South Carolina v. Regan*, 465 U.S. 367, 79 L. Ed. 2d 372, 104 S.Ct. 1107 (1984). In that case, the state of South Carolina challenged the constitutionality, under the Tenth Amendment, of a provision in the tax code that set certain requirements for state-issued bonds. *Id.* The Court noted that if the Act were to bar the state's pre-enforcement lawsuit, South Carolina would itself incur no tax liability and thus would have to depend on third parties to pursue post-enforcement refund suits. *Id.* at 373. The Court, in determining that South Carolina's suit could go forward, held that Congress had intended the Act to bar suits only when Congress had provided the aggrieved party with "an alternative legal avenue by which to contest the legality of a particular tax." *Id.*

If this language is given the broadest interpretation possible, Plaintiff's claims for injunctive relief could come under the *South Carolina v. Regan* exception. Defendants concede that the tax code provides no avenue of relief specifically for targets of allegedly unconstitutional audits.[8] Courts construing the exception, however, have strictly limited its applicability. *See, e.g., Spencer v. Brady*, 700 F. Supp. 601, 604 (D.D.C. 1988) (finding that "in *Regan*, the Court carved an extremely narrow second exception to the Anti-Injunction Act"); *American Society of Assoc. Executives v. Bentsen*, 848 F. Supp. 245, 250 (D.D.C. 1994) (noting that the exception "is a narrow one tailored to the unique factual pattern in that case"); *Leves v. Internal Revenue Service*, 796 F.2d 1433, 1434 (11th Cir. 1986) (finding the exception inapplicable because Regan "involved the rights of third parties to litigate the tax liability of persons against whom the tax was assessed").

The present case bears virtually no factual resemblance to *South Carolina v. Regan*, and Plaintiff has not cited any cases where the exception was stretched to permit the injunction of an audit. The burden is on Plaintiff to establish subject matter jurisdiction. *See*, Fed. R. Civ. P. 12(b)(1); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). Plaintiff has not persuaded this Court to break new ground in extending the recognized exceptions to the Anti-Injunction Act. If this Court were to do so, the door would swing wide open for audit targets to haul the I.R.S. into court anytime they

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[8] Plaintiff's statutory remedies are limited to a suit for a refund, if taxes are ultimately assessed, and a suit for declaratory relief if Judicial Watch is stripped of its tax-exempt status. *See*, 26 U.S.C. §§ 7422, 7428.

believed the audit to be wrongful.[9] Such a result seems to constitute precisely the kind of judicial interference with the assessment and collection of taxes that the Act was designed to prevent.

Having found that this Court does not have jurisdiction to reach Plaintiff's claims for injunctive relief contained in Counts 1-3 of the Amended Complaint, those claims will be dismissed.[10] For the same reasons, Plaintiff's Motion to Stay or Enjoin Enforcement of Administrative Summons will also be dismissed.[11]

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[9] Indeed, it is the rare audited taxpayer who does not believe that their audit is undeserved.

[10] The Court, having found that the Anti-Injunction Act requires the dismissal of these claims, need not address Defendants' argument that the claims are also barred by the doctrine of sovereign immunity, which disallows claims to enjoin government actors from performing their statutory duties. See, *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 688, 93 L.Ed. 1628, 69 S.Ct. 1457 (1949).

[11] If the I.R.S. brings an action to enforce the summons, Plaintiff will have an opportunity, in a limited evidentiary hearing in federal district court, to challenge the propriety of the audit and offer evidence of wrongful conduct. *See, Alphin v. United States*, 809 F.2d 236 (4th Cir. 1987).

B. Monetary Relief

Under some circumstances, a plaintiff may bring suit for money damages against individual federal employees for alleged constitutional torts. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 29 L.Ed. 2d 619, 91 S.Ct. 1999 (1971). Here, Plaintiff has asserted claims for monetary relief against each of the Individual Defendants for their allegedly unconstitutional conduct. Defendants argue that a *Bivens* remedy is not available in a suit against I.R.S. employees for conducting an allegedly unconstitutional audit.

The Fourth Circuit's position on this matter is somewhat in question. In a 1976 decision, the Fourth Circuit affirmed a district court's ruling that, although a *Bivens* action was available to a taxpayer who sued I.R.S. agents for harassing him and singling him out for investigation and audit, the claims failed on summary judgment for lack of evidence. *White v. Boyle*, 538 F.2d 1077, 1079 (4th Cir. 1976). In so deciding, the court stated that, "clearly, if White can demonstrate an injury consequent upon the violation by federal agents of his constitutionally protected rights, absent official immunity, he is entitled to recovery." *Id.*

Since *White*, however, the United States Supreme Court has restricted the availability of Bivens actions, by expanding on language in *Bivens* indicating that such relief is permissible only when there are "no special factors counseling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396. The Court has found that affirmative action by Congress to create a statutory or regulatory remedial scheme, even if the scheme lacks complete remedies for

constitutional violations, is sufficient to bar a Bivens action. *See, e.g., Schweiker v. Chilicky*, 487 U.S. 412, 101 L.Ed. 2d 370, 108 S.Ct. 2460 (1988) (remedial scheme in context of social security system); *Chappell v. Wallace*, 462 U.S. 296, 304, 76 L.Ed. 2d 586, 103 S.Ct. 2362 (1983) (remedial scheme in context of military justice system); *Bush v. Lucas*, 462 U.S. 367, 368, 76 L.Ed. 2d 648, 103 S.Ct. 2404 (1983) (remedial scheme in context of civil service system). Summing up its approach to these cases, the Court stated, "when the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional Bivens remedies." *Schweiker* at 423.

Circuit courts have applied this reasoning to deny *Bivens* claims in lawsuits against I.R.S. employees where the plaintiffs would have another avenue of relief through the provisions of the Internal Revenue Code. *See, e.g., Shreiber v. Mastrogiovanni*, 214 F.3d 148 (3rd Cir. 2000); *Fishburn v. Brown*, 125 F.3d 979, 982-83 (6th Cir. 1997); *Vennes v. Unknown Number of Unidentified Agents*, 26 F.3d 1448, 1453-53 (8th Cir. 1994). In these cases, however, the harm caused by the alleged constitutional violations amounted to the illegal assessment or collection of taxes, which could be cured, at least for the most part, by refund suits and other similar statutory remedies. In contrast, where the constitutional violation is a harm in itself, such as the suppression of political speech or the violation of Fourth Amendment rights, courts have recognized the propriety of a Bivens remedy. *See, Nat'l Commodity and Barter Assoc. v. Gibbs*, 886 F.2d 1240, 1248 (10th Cir. 1989) (permitting *Bivens* action for violations of the First and Fourth

Amendments because "certain values ... may be superior to the need to protect the integrity of the internal revenue system"); *Western Center for Journalism v. Cederquist*, 235 F.3d 1153, (9th Cir. 2000) (Reinhardt, J., concurring) (observing that a *Bivens* remedy is appropriate for retaliatory audits because Congress has fashioned no remedy for I.R.S. conduct that punishes political speech); *Hurt v. United States*, 889 F. Supp. 248 (S.D. W.Va. 1995) (finding grounds for a *Bivens* remedy where plaintiffs sued I.R.S. agents for allegedly retaliatory and harassing auditing practices).

Accordingly, this Court is persuaded that a *Bivens* action should be available where, as here, the statutory remedies provided in the Internal Revenue Code (*i.e.*, a refund suit and action for declaratory relief) would not address the alleged constitutional wrongs of the I.R.S. defendants.[12] This does not end the inquiry, however, because the Individual Defendants argue that they are entitled to qualified immunity for their actions relating to the Judicial Watch audit.

Government officials performing discretionary functions are entitled to qualified immunity to the extent that "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L.Ed. 2d 396, 102 S.Ct. 2727 (1982). Qualified immunity is "an

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[12] Defendants concede that the only statutory remedies available to Plaintiffs through the Internal Revenue Code consist of a suit for a refund, if taxes are ultimately assessed, and a suit for declaratory relief if Judicial Watch is stripped of its tax-exempt status. *See*, 26 U.S.C. §§ 7422, 7428.

immunity from suit rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 86 L.Ed. 2d 411, 105 S.Ct. 2806 (1985). Accordingly, courts should resolve a question of qualified immunity at the earliest possible stage of the litigation. *See, Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2155-56, 150 L.Ed. 2d 272 (2001).

The threshold question in a qualified immunity inquiry is, "taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier*, 121 S.Ct. at 2156. If a violation could be found on a favorable view of the plaintiff's facts, the court then considers "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* In this case, Plaintiff alleges that the audit violates Judicial Watch's First Amendment rights by punishing the organization's political speech and freedom of association, and that it violates Plaintiff's Fifth Amendment due process rights by harassing Judicial Watch and singling it out for audit without basis in law. Although the facts alleged in the Amended Complaint, when viewed in the light most favorable to Plaintiff, might make out these constitutional violations, they fail to show that reasonable I.R.S. agents in the situation faced by Defendants would have known they were committing these constitutional violations.

The overriding, insurmountable problem for Plaintiff's claims is that the political speech for which it claims to be "punished" and "singled out" is exactly the type of activity that may legitimately cause it to lose tax-exempt status under § 501(c)(3), which requires that organizations "not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in

opposition to) any candidate for public office," and that "no substantial part of [its] activities is carrying on propaganda, or otherwise attempting, to influence legislation." 26 U.S.C. § 501(c)(3).

As to Defendants Rossotti, Dorsey, and Miller, Plaintiff contends that they violated Plaintiff's rights by making the decision to conduct an audit, sending Plaintiff audit notices and summons, and/ or failing to stop the audit at Plaintiff's request. These allegations could just as easily be interpreted, however, as evidence of Defendants' efforts to enforce I.R.S. statutes and regulations. In its attempt to show a causal connection between its actions and the behavior of these Defendants, Plaintiff presents a chronology of events that reveals Judicial Watch's persistence in resisting the audit and the I.R.S.'s persistence in pursuing it. On the facts presented by Plaintiff, therefore, these Defendants are entitled to qualified immunity.

This Court is confronted with a more difficult decision regarding Defendants Breslan and Hampel. Taking Plaintiff's allegations as true, Defendant Breslan's comments at the November, 1998 meeting, and Defendant Hampel's warnings that Plaintiff was still on the I.R.S. "radar screen," could constitute evidence of bad faith or retaliation by those agents. It is equally plausible, however, that their comments reflect the agents' reasonable suspicions that Judicial Watch was operating outside the confines of § 501(c)(3). This Court, while not condoning the alleged comments, cannot conclude that Defendants Breslan and Hampel should have known that their conduct violated Plaintiff's constitutional rights. Therefore, qualified immunity is appropriate here as well.

Certainly, the I.R.S. and its agents are bound by the tenets of the Constitution in the enforcement of the agency's rules and regulations. To deny qualified immunity under these facts, however, would grossly impede the agency's ability to investigate suspected violations of § 501(c)(3)'s prohibitions on certain political activity. Any tax exempt organization engaging in possibly prohibited conduct, which was subsequently audited or investigated by the I.R.S., could maintain a suit for harassment and suppression of political speech simply by pointing to the timing of the audit. Agents, fearing civil liability for their discretionary decision to conduct an audit, would be hampered in their official duties. On the facts presented in the Amended Complaint, therefore, this Court concludes that Defendants Rossotti, Dorsey, Breslan, Hampel, and Miller are entitled to qualified immunity on the claims against them for monetary relief.

IV. CONCLUSION

For the foregoing reasons, the Court will deny Plaintiff's Motion to Stay or Enjoin Enforcement of Administrative Summons, and will grant Defendants' Motion to Dismiss all claims against them. A separate order consistent with this memorandum will issue.

William M. Nickerson
United States District Judge

Dated: March 27, 2002

ORDER

Pursuant to the foregoing Memorandum, and for the reasons stated therein, IT IS this 27th day of March, 2002, by the United States District Court for the District of Maryland, ORDERED:

1. That Plaintiff's Motion to Stay or Enjoin Enforcement of Administrative Summons (Paper No. 11) is hereby DENIED;

2. That the Motion to Dismiss filed by Defendants Rossotti, Dorsey, Breslan, Hampel, and Miller (Paper No. 13) is hereby GRANTED;

3. That the Clerk of the Court shall mail or transmit copies of this Memorandum and Order to all counsel of record.

William M. Nickerson
United States District Judge

(2)

AUG 2 2 2003

No. 02-1849

In the Supreme Court of the United States

JUDICIAL WATCH, INC., PETITIONER

v.

CHARLES O. ROSSOTTI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether, on the facts of this case, petitioner possesses a cause of action for damages against individual officers and employees of the Internal Revenue Service under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), based on allegations of a retaliatory federal income tax examination.

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In the Supreme Court of the United States

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JUDICIAL WATCH, INC., PETITIONER

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CHARLES O. ROSSOTTI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 317 F.3d 401. The opinion of the district court (Pet. App. 31-50) is reported at 217 F. Supp. 2d 618.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2003. A petition for rehearing was denied on March 24, 2003. Pet. App. 29-30. The petition for a writ of certiorari was filed on June 23, 2003 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner describes itself as a "non-partisan legal 'watchdog' organization" that seeks to "protect the American people from, and educate them about, corruption in government and abuses of power, and to enforce the principle that 'no one is above the law.'" Pet. App. 3. Since 1995, petitioner has operated as a tax-exempt organization under the provisions of 26 U.S.C. 501(c)(3). To qualify under that provision, "no substantial part" of its activities can be devoted to lobbying.[1] 26 U.S.C. 501(c)(3); see Pet. App. 3.

During the late 1990's, petitioner filed a number of lawsuits against President Clinton and Mrs. Clinton. Pet. App. 4. In September 1998, during impeachment proceedings against President Clinton, petitioner submitted a report to Congress entitled *Interim Report: Crimes and Other Offenses Committed by President Bill Clinton Warranting His Impeachment and Removal from Elected Office* (*Interim Report*). *Ibid.* Several days after submitting the *Interim Report*, petitioner received a letter from the Internal Revenue Service stating that it had been selected for audit. *Ibid.*

2. In September 2001, petitioner filed this action in federal district court against former Commissioner of

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[1] Section 501(c)(3) provides tax-exempt status for an otherwise qualified organization if:

> no substantial part of [its] activities * * * is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and [if the organization] does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

26 U.S.C. 501(c)(3).

Internal Revenue Charles Rossotti, four individual Internal Revenue Service (IRS) agents, and the United States. Pet. App. 5.[2] The complaint, as amended, alleged that the IRS audit was "retaliatory, politically-motivated, and unconstitutional," in violation of petitioner's "First Amendment free speech rights, Fifth Amendment due process rights, and Fifth Amendment right to be free from selective prosecution." *Ibid.* The complaint sought an injunction prohibiting the defendants from proceeding with the audit. It also sought the production of various documents pursuant to the Freedom of Information Act (FOIA) and compensatory and punitive damages against the Commissioner and the IRS employees. *Ibid.*

3. The district court granted the motion to dismiss filed by the individual defendants. Pet. App. 31-50.[3] The court first held that the plain text of the Anti-Injunction Act bars it from exercising jurisdiction over petitioner's request for injunctive relief. *Id.* at 39-43. The court then held that the claim for money damages

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[2] Petitioner filed an amended complaint in January 2002, withdrawing its claims against the United States, and adding the Department of the Treasury and the IRS as defendants. Pet. App. 5.

[3] The motion to dismiss filed by the individual defendants did not address the FOIA claims. Those claims had been brought against the IRS itself. Pet. App. 38 n.6. In a subsequent order, the district court granted judgment in favor of the IRS on those claims. An appeal of that decision is currently pending before the Fourth Circuit. No. 03-1160 (filed Mar. 26, 2003).

In January 2002, the IRS served petitioner with an administrative summons demanding the production of documents relating to the pending tax audit. Pet. App. 38. Petitioner filed a motion to stay or enjoin enforcement of that administrative summons. *Id.* at 32, 38. For the same reasons that the court dismissed petitioner's claims for injunctive relief, it also dismissed the motion to stay enforcement of the summons. *Id.* at 43.

must also be dismissed because, even assuming that a *Bivens* remedy is available for a retaliatory tax audit (*id.* at 44-45), the individual defendants are entitled to qualified immunity from such a claim. *Id.* at 46-49.

4. The court of appeals affirmed. The court agreed with the district court that the plain text of the Anti-Injunction Act bars the injunctive relief requested by petitioner. Pet. App. 7-17.[4] The court then further held that a *Bivens* action is not available for an allegedly retaliatory tax audit. *Id.* at 17-27. Because it concluded that no *Bivens* action exists in this context, the court found it unnecessary to address whether qualified immunity would apply in this case. *Id.* at 17 n.4.

The court of appeals noted that, in recognizing in *Bivens* an implied private cause of action for damages against federal agents who allegedly conduct an illegal search and seizure, this Court emphasized that this constitutional cause of action would be recognized because there was "'no explicit congressional declaration' prohibited it, and 'no special factors [counselling] hesitation [by the Court] in the absence of affirmative action by Congress.'" Pet. App. 17 (quoting *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396-397 (1971)). The court of

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[4] The court also made clear that it found petitioner's allegations of a retaliatory audit to be less than persuasive (Pet. App. 10):

> The initial difficulty with this argument is that, although the amended complaint contains general allegations of retaliatory conduct by IRS agents based on the factual chronology outlined above, the complaint does not allege that the individual IRS agents even knew that Judicial Watch had filed various lawsuits, much less its *Interim Report*, explicitly targeting the Clinton administration. Nor does Judicial Watch dispute that the Inspector General conducted two investigations and twice exonerated the individual IRS employees involved in the audit decision.

appeals emphasized that this Court has been reluctant to create other causes of action for money damages based on *Bivens*, especially in circumstances involving complex statutory schemes in which Congress has provided meaningful avenues for redress. *Id.* at 18-19 (citing *Bush* v. *Lucas*, 462 U.S. 367 (1983), and *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988)). In concluding that a *Bivens* action does not lie for the allegations of retaliatory tax audits asserted in this case, the court of appeals noted that "[i]t would be difficult to conceive of a more comprehensive statutory scheme, or one that has received more intense scrutiny from Congress, than the Internal Revenue Code." *Id.* at 20.

The court of appeals explained that the Internal Revenue Code provides numerous methods for petitioner to challenge the conduct of the agency. Pet. App. 21. In particular, with respect to actions of individual IRS employees, Congress enacted 26 U.S.C. 7433 in 1988 to establish a civil damages action against the United States for individual misconduct in the collection (but not the investigation or determination) of taxes.[5] Pet. App. 22. See note 5, *supra*. The court noted that the legislative history of this statute makes

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[5] 26 U.S.C. 7433(a) provides in pertinent part:

> If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432 [civil damages for failure to release lien], such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

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clear that "Congress did not act inadvertently in failing to create an action for damages allegedly arising from the investigation or determination of tax liability." *Id.* at 23. The court explained that "Congress's considerable attention to the rights and remedies available to taxpayers and [this Court's] hesitancy in creating *Bivens* remedies in such circumstances provide strong support for the conclusion that no *Bivens* remedy lies in this case." *Id.* at 24.

The court of appeals emphasized that no other appellate court has dealt with the precise question whether a *Bivens* action is available for an allegedly retaliatory tax audit. Pet. App. 25. The court noted that Judge Reinhardt, in his concurrence in *Western Center for Journalism* v. *Cederquist*, 235 F.3d 1153 (9th Cir. 2000) (per curiam), expressed the view that such a remedy should be available. It also noted that, in *National Commodity & Barter Ass'n* v. *Archer*, 31 F.3d 1521 (1994) (NCBA), the Tenth Circuit concluded that a *Bivens* remedy would lie in situations involving unwarranted searches and seizures for which the Internal Revenue Code provided no mechanism for compensation. See Pet. App. 25-26. The court of appeals observed, however, that neither the *Western Center* nor *NCBA* opinions considered the enactment of Section 7433 in 1988 or the legislative history of that statute. *Id.* at 26. The court of appeals stated in conclusion that "[w]e * * * decline 'to create a new substantive legal liability * * * because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it.'" *Id.* at 27 (quoting *Schweiker* v. *Chilicky*, 487 U.S. at 426-427, and *Bush* v. *Lucas*, 462 U.S. at 390).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly recognized that this Court's precedents reflect a strong reluctance to recognize new *Bivens* actions. As the court of appeals noted, since the decision in *Bivens*, this Court had recognized only two additional categories of *Bivens* actions: in *Davis* v. *Passman*, 442 U.S. 228 (1979), the Court found such an action under the due process clause of the Fifth Amendment; and, in *Carlson* v. *Green*, 446 U.S. 14 (1980), the Court found such an action under the cruel and unusual punishment clause of the Eighth Amendment. Pet. App. 17-18. Moreover, as this Court emphasized in *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), cases arising from complex statutory schemes are particularly inappropriate candidates for a *Bivens* action (id. at 423):

> the concept of "special factors counselling hesitation in the absence of affirmative action by Congress" has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent. When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.

Indeed, petitioner acknowledges that both *Schweiker* and *Bush* v. *Lucas*, 462 U.S. 367 (1983), "hold that, when Congress affords a remedy for a particular harm, a court may not judicially create an additional remedy,

even if the congressionally-created remedy does not afford complete relief." Pet. 18. See *Schweiker* v. *Chilicky*, 487 U.S. at 425 (Congress need not provide "complete" relief but only "meaningful safeguards or remedies"). The Court expressed that same view in *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61, 69 (2001) ("So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability.").[6]

With these guiding principles in mind, the court of appeals properly determined that the "vast and exceedingly complex statutory apparatus" of the Internal Revenue Code provides taxpayers with a variety of safeguards and remedies against the misconduct of the IRS and its individual agents. Pet. App. 20-22. As the court emphasized, the text and history of Section 7433 of the Code reflect that Congress carefully considered, and rejected, a damages remedy that would have encompassed wrongful tax audit proceedings. *Id.* at 23-24. The detailed history of this statute amply establishes that the legislative determination that money damages are not an appropriate remedy in this context was not inadvertent. *Id.* at 27. See *Shreiber* v. *Mastrogiovanni*, 214 F.3d 148, 152-153 (3d Cir. 2000) (declining to extend *Bivens* remedy in connection with assessment of tax liability in light of Section 7433). The court of appeals correctly followed and applied this Court's precedents in *Bush* and *Schweiker* in determining, in this detailed statutory context, that it was for Con-

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[6] Petitioner thus errs in claiming (Pet. 15-27) that the decision in this case conflicts with the decisions of this Court in *Bush* v. *Lucas*, 462 U.S. 367 (1983), and *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988).

gress, rather than for the court, to determine the scope and availability of a damages remedy for allegedly retaliatory tax audits.

2. Petitioner errs in claiming (Pet. 27-28) that the decision in this case conflicts with the *Western Center* and *NCBA* cases. In *Western Center*, the Ninth Circuit held that any *Bivens* suit that might exist would be barred by the statute of limitations. 235 F.3d at 1158. The court had no occasion to, and therefore properly did not, address whether the plaintiff's asserted *Bivens* claim stated a valid cause of action. Instead, the court "dismiss[ed] the action on the ground that, whether or not a *Bivens* remedy is available, [the putative] action is time-barred." *Id.* at 1157. And, as the court of appeals noted in this case (Pet. App. 26), the concurring opinion of Judge Reinhardt in *Western Center*—which concluded that a *Bivens* action would exist for "a retaliatory audit on account of the expression of one's political views" (235 F.3d at 1159)—fails to give any consideration to the text or clear history of Section 7433. In any event, the *dictum* contained in the concurring opinion of a single judge does not establish the views of the Ninth Circuit and does not establish a conflict between the circuits on the question presented in this case.

There is also no conflict between the decision in this case and the decision of the Tenth Circuit in the *NCBA* case. As the court of appeals noted below (Pet. App. 26), the court in *NCBA* had no occasion to consider or discuss Section 7433 or its clear history because the events at issue in *NCBA* occurred between January 1984 and October 1985 and thus preceded the enactment of Section 7433 by several years. See *NCBA*, 31 F.3d at 1525-1526. And, in *NCBA*, the court allowed a *Bivens* claim to stand only for allegedly unconstitutional searches and seizures that assertedly sought in-

formation in a manner that interfered with associational rights. *Id.* at 1530-1532. The narrow holding of that case plainly does not stand for the broad proposition advanced by petitioner in this case that a *Bivens* remedy is available for a "retaliatory" tax audit.

Especially in light of the fact that the Tenth Circuit in *NCBA* had no occasion to consider the role of Section 7433 in its analysis, there is no reason to assume that, if the Tenth Circuit were presented with a case involving an allegedly retaliatory audit occurring after the enactment of Section 7433, it would reach a decision contrary to the decision reached by the court in this case. There is thus no present conflict among the circuits that would warrant review by this Court at this time.

3. There is also no merit to petitioner's assertion that the question whether a *Bivens* remedy is available for an allegedly retaliatory tax audit is of sufficient importance to merit certiorari in the absence of a conflict. Pet. 27. Only a handful of cases have raised or addressed this issue even indirectly. Review by this Court would thus be premature, for it would preclude initial consideration and development of the relevant issues in the various courts of appeals.

Review in this case is also unnecessary because, as the district court correctly concluded, petitioner could not prevail even if a *Bivens* remedy existed. Because respondents' conduct did not violate any clearly established constitutional right, they would be entitled to qualified immunity even if a *Bivens* cause of action might otherwise exist. Pet. App. 46-49.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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